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United States
Circuit Court of Appeals
For the Ninth Circuit

OLGA SUNDIN, et al.,

Plaintiffs in Error,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a
Corporation

Defendant in Error.

Transcript of the Record

*Upon Writ of Error from the United States District
Court for the District of Idaho,
Northern Division.*

Filed

SEP 13 1917

F. D. Monckton,
Clerk.

No.....

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INDEX

	PAGE
Answer	17
Assignments of Error.....	152
Bill of Exceptions.....	27
Bond on Writ of Error.....	156
Complaint	7
Citation on Writ of Error.....	160
Clerk's Certificate	162
Charge to Jury.....	144
Evidence	28-144
Judgment	27
Order Settling Bill of Exceptions.....	149
Order Allowing Writ of Error.....	155
Petition for Writ of Error.....	151
Praecipe	158
Return to Writ of Error.....	162
Verdict	149
Writ of Error.....	159

Names and Addresses of Attorneys of Record

Messrs. Plummer & Lavin,
Spokane, Washington.

Messrs. Black & Wernette,
Coeur d'Alene, Idaho.

Attorneys for Plaintiffs in Error.

Ralph S. Nelson, Esq.,
Coeur d'Alene, Idaho.

Attorney for Defendant in Error.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

No. 672.

OLGA SUNDIN, and MARGUARETTE SUNDIN,
IVER SUNDIN, and EUGENE SUNDIN, mi-
nors, by Olga Sundin, their Guardian ad Litem,
Plaintiffs,

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a
Corporation,

Defendant.

COMPLAINT.

Come now the plaintiffs, and for cause of action
against the defendant, allege:

1.

That the above named plaintiffs are residents,
citizens and inhabitants of the State of Idaho, and
residents of and within the judicial district and divi-
sion of the above entitled court.

2.

That the above named defendant is a corporation,
created, organized, and existing under and by virtue
of the laws of the State of Washington, and a citizen
of the State of Washington.

3.

That plaintiffs, Marguarette Sundin, Iver Sundin,
and Eugene Sundin are the minor children of Axel
Sundin, deceased, and Olga Sundin, one of the plain-
tiffs herein, and said plaintiff Olga Sundin is the duly

appointed and acting guardian ad litem of the said minor children, and brings this action on her own behalf, and on behalf of the said minor children.

4.

That at all times herein mentioned, the defendant owned, operated, and controlled a certain lumber manufacturing plant in Kootenai County, in the State of Idaho, and was engaged in the manufacturing of lumber and lumber materials, and had adjacent thereto and in connection with said lumber manufacturing plant, yards, lumber cars, tracks, platforms, and other equipment which was used by the defendant in carrying on its manufacturing business, and in transporting said lumber and lumber products.

5.

That on to-wit, the 15th day of May, 1916, Axel Sundin was in the employ of defendant, and was working in and about its lumber yards, above mentioned.

6.

That said Axel Sundin, was at the time of his death and injury hereinafter mentioned, the husband of plaintiff, Olga Sundin, and the father of the said minor children.

7.

That a part of the equipment, appliances, and structures in and about the yards wherein said Axel Sundin was working, at the time of his injury and death, hereinafter mentioned, there were certain runways, platforms, and endless chain rollers, extending

out from the saw mill of defendant at right angles therewith, and when the lumber was taken from said sawmill, it was transported out on the said endless chain roller appliances, to the end of said extended structure or platform, wherefrom it was taken by employees of the defendant, and placed upon small lumber cars, which cars were situated at right angles with the outer end of said platform or structure.

8.

That there was constructed and used by defendant, certain narrow railway tracks, extending from said endless chain roller platform structure in a southerly direction, to another track running at right angles with said last mentioned short tracks, and on said last mentioned tracks said Company provided and used what is known as "transfer cars" for the purpose of transporting the lumber down to another part of the company's yards for transportation away from said lumber plant. That the manner and method of carrying on such work was as follows:

Said lumber would be carried out to the end of said endless chain roller platform and structure, and taken therefrom by workmen in the employ of defendant and piled upon small lumber cars on the said tracks, which cars were standing at right angles with said endless chain roller structure and platform, and when said small lumber cars were loaded with lumber, they would be pushed along said short tracks by other men in the employ of defendant, and pushed over and upon a transfer car, which was set opposite said short track on a transfer track at right angles

with said short tracks, and it was necessary to move said small cars of lumber, loaded as aforesaid, along said short tracks and upon said transfer cars. The car and lumber were placed upon said transfer car.

9.

That the surface of the transfer car was about one inch higher than the surface of the track over which said small lumber cars were transported, and in order to get said car of lumber, including the car, upon said transfer car, it was necessary and customary for the men pushing said small car of lumber to give it an extremely hard and violent push, so that the same would be placed upon the rails of said transfer car by its own momentum, and would thereby be placed upon the surface of the said transfer car.

10.

That on to-wit, the 15th day of May, 1916, the deceased, Axel Sundin, was in the employ of defendant, as aforesaid, in another part of the yards of said company, and after one of the said small cars of lumber has been loaded with lumber, said Axel Sundin was called from his duties in another part of said yards and directed, by the foreman, who was in charge of said work, Ed Moe, to go to said loaded car and assist the other men, who had been directed to move said car, in pushing said car along said track, up to and upon the said transfer track and transfer car above referred to, and in pursuance of his duties, said Axel Sundin, obeyed the orders that said foreman, Ed Moe, and left his work in another

part of the said yards and went to the southern part of said yards and joined the other workmen of the defendant, according to the orders and instructions of said foreman, in moving and pushing said load of lumber along said short tracks.

11.

That three of the men who were engaged in shoving and pushing said car, were walking at the rear of said car while pushing the same, and it was therefore impossible for said deceased Sundin to assist in moving said car, excepting by walking along the side of the said car, and by taking hold of the side of said car, and in that manner push the car along said tracks, which he was doing at the time of his injury and death hereinafter referred to, to the utmost of his ability, and it was his duty to perform said work in the manner in which he was performing it. That when said car had been moved to the said transfer car, and in order to force said load of lumber car upon said transfer car, it was necessary, on account of the fact that the surface of said transfer car was one inch higher than the surface of the rails upon which said lumber car was standing, for all of the men who were engaged in moving said car, including the said Axel Sundin, to give said loaded car an extraordinarily violent push and shove, and while all the said men, including the said Axel Sundin, were doing so, a part of said lumber on the said car collapsed, and fell over and upon the person of said Axel Sundin, causing him injuries, from which he afterwards on to-wit, June 14th, 1916, died.

12.

That the pile of lumber on said car consisted of boards which were 1 inch x 6 inches x 16 feet, and were green, white pine, and very rough lumber. They were piled six tiers in width, and fifty-five courses high. All of said lumber was very heavy. That the usual load placed upon said cars was from forty-five to fifty courses high, and the load which collapsed and caused the death of said Axel Sundin was larger, higher and heavier than it was customary to place on said lumber cars.

13.

That the falling over and collapsing of said lumber pile from the said car, was due wholly and exclusively to the carelessness and negligence of defendant, its agents, and servants, in the manner of which said lumber was loaded upon said car, in this to-wit: that it was customary, usual and necessary in order to make said load of lumber safe from falling over, that there should be inserted between every few courses, and laid crosswise of said car, cross pieces, so as to bind and hold said upright tiers of lumber, in order to prevent said lumber pile from falling over and collapsing and said lumber pile would in that manner be held stationary and could then be moved in safety in the manner in which it was necessary to be moved, and in which manner it was being moved, at the time of the said collapsing, in order to accomplish the results which said Axel Sundin and his associates were required to accomplish.

14.

That defendant failed and neglected to place any cross pieces on said load so as to keep the same from falling off, or secure said load in any manner, and that if said binders or cross pieces had been put on said load, the said load and lumber thereon could not and would not have fallen over and upon said Axel Sundin, causing his injury and death, hereinbefore mentioned.

15.

That said Axel Sundin had nothing to do with the loading of said car, or the handling of the same, excepting as hereinbefore mentioned; that he relied upon the performance by the defendant of its duty to load the said car so that it could be safely pushed over and upon said transfer car, and without danger of falling off or collapsing. That he was performing the acts hereinbefore mentioned in assisting in pushing said car along said tracks, under the direct command of the foreman of said company, Ed Moe, and in so doing could not and did not anticipate or appreciate any danger in doing those acts which he was doing, and which it was his duty to do, at the time of the happening of the accident, hereinbefore referred to.

16.

That the service of the transfer car upon which it was the duty of said Axel Sundin and his associates to place said car of lumber, was constructed, used, and maintained in a defective and unsafe manner, in this, towit: that the track upon which said

transfer car was standing was of such a heighth as to bring the level of the transfer car to a point one inch higher than the level of the track upon which said car of lumber was necessarily transported over, the said difference in height being due to the irregularity of the ground, over which the said transfer car track and lumber car track were built and maintained and which could have been easily remedied and obviated in the exercise by the defendant of reasonable care. That the condition of the said transfer car track was due wholly to the carelessness and negligence of defendant, as aforesaid, and that said condition was one of the contributing causes of the injury of and death of the said Axel Sundin, in this, to-wit: that had said track upon which said car of lumber was being transported been maintained on a level with the surface of the transfer car, upon which said car of lumber had to be rolled or placed, no extradordinary or violent pushing of said car of lumber would have been necessary, and would have obviated the shock to said car of lumber, which added and contributed to the collapsing of said car of lumber, and falling down of the tiers thereof, as aforesaid.

17.

That while said Axel Sundin knew of the difference in heighth of said track with the said transfer car, and the necessity for violent and extraordinary movement of said car, in order to overcome the obstruction, caused by the difference in height, he complained to the said foreman, Ed Moe, of the con-

dition of said track and transfer car, and the necessity for the violent shoving of said car of lumber upon said transfer car, which complaint was made to said Moe, immediately upon being ordered to go around and assist in the movement of said car of lumber, and said Moe as foreman, promised said Sundin that the same would be repaired in a few days, and then and there ordered him to go on and assist in moving said car, regardless of condition of said track, which order was preemptorily given and said Sundin, knowing and appreciating that it meant his discharge from the service of the defendant if he did not obey, and relying on the promise of said foreman, proceeded with the performance of his duties as instructed by said foreman, Moe, and did perform the duties required of him, as hereinbefore mentioned.

18.

That at no time did said Axel Sundin know of the failure of defendant to place, at certain intervals, cross pieces at right angles on said load of lumber so as to bind the same, and thereby prevent the same from tumbling off or collapsing, and could not have been so informed in the exercise of reasonable care by him.

19.

That by reasons of the facts herein pleaded, the carelessness, and negligence on the part of the defendant in causing the injury and death of said Axel Sundin, plaintiffs are and have been damaged in the sum of Fifty Thousand Dollars (\$50,000.00), no part of which has been paid.

Wherefore, Plaintiffs demand judgment against defendants for Fifty Thousand Dollars (\$50,000.00) and for their costs and disbursements herein.

PLUMMER & LAVIN,
Attorneys for Plaintiffs,
residing at Spokane, Wash.
BLACK & WERNETTE,
Attorneys for Plaintiffs,
residing at Coeur d'Alene, Ida.

State of Idaho,
County of Kootenai,—ss.

Olga Sundin, being first duly sworn, deposes and on oath says: that she is one of the plaintiffs in the above entitled action; that she has read the foregoing complaint, knows the contents thereof, and that the same is true, as she verily believes.

OLGA SUNDIN.

Subscribed and sworn to before me this 19th day of December, 1916.

EDWARD H. BERG,
Notary Public in and for the State
of Idaho, residing at Coeur d'Alene,
(N. P. Seal) Idaho.

Endorsed: Filed Dec. 20, 1916.

W. D. McReynolds, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause.)

ANSWER.

Comes now the above named defendant, and for answer to plaintiffs' complaint says:

I-VIII.

In answering paragraphs one to eight inclusive, defendant admits the allegations of one, two, three, four, five, six, seven and eight.

IX.

Answering paragraph nine defendant denies that the surface of the transfer car was about one inch higher or any amount higher than the surface of the track over which said small cars were transported, and denies that in order to get said car of lumber including the car, upon said transfer car, it was necessary or customary for the men pushing said small car of lumber to give it an extraordinarily hard or violent push, so that the same would be placed upon the rails of said transfer car by its own momentum, and would thereby be placed upon the surface of said transfer car.

X.

Defendant admits that on the 15th day of May, 1916, Axel Sundin was in the employ of defendant, but denies that at said time he was employed in another part of the yards of said company, and denies that after one of said small cars of lumber had been loaded with lumber, said Axel Sundin was called from his duties in another part of said yard and directed by the foreman who was in charge of said work, Ed Moe, or by any other party, to go to said

loaded car and assist the other men who had been directed to move said car, in pushing said car along said track up to and upon the said transfer track or said transfer car above referred to, and denies that in pursuance of his duties said Axel Sundin obeyed the orders of said foreman Ed Moe, and denies that the said Axel Sundin left his work in another part of said yards and went to the southern part of the said yards and joined the other workmen of defendant according to the orders or instructions of said foreman or any other person, in moving and pushing said load of lumber along said short tracks.

XI.

Answering paragraph eleven, defendant denies that three of the men who were engaged in shoving and pushing said car were walking at the rear of said car, while pushing the same, and denies that it was impossible for said deceased, Sundin, to assist in moving said car except by walking along the side of said car, and denies that it was impossible for said deceased, Sundin, to assist in moving said car except by taking hold of the side of said car, and in that manner push the car along said tracks, which he was doing at the time of his injury and death; and defendant denies that it was the duty of said deceased to perform said work in the manner in which he was performing it, or that he was doing said work to the utmost of his ability. Defendant denies that when said car had been moved to said transfer car, and in order to force said car of lumber upon said transfer car, it was necessary on account of

the fact that the surface of the said transfer car was one inch higher or any higher than the surface of the rails upon which said car of lumber was standing, for all or any of the men who were engaged in moving said car, including the said Axel Sundin, to give said car an extraordinarily violent push or shove, and defendant denies that while all of said men, including said Axel Sundin, were doing so, a part of said lumber on said car collapsed and fell over and upon the person of said Axel Sundin, causing him injuries from which he afterwards, on to-wit: June 14th, 1916, died; defendant admits that on May 15th, 1916, while Axel Sundin was walking along the side of a truck of lumber, a part of said lumber fell over and upon the person of said Axel Sundin, causing him injuries from which he afterwards, on to-wit: June 14th, 1916, died.

XII.

Answering paragraph 12 defendant admits that the pile of lumber on said car consisted of boards which were about 1 inch x 6 inches x 16 feet, and that they were green, white pine, and rough lumber; defendant admits that they were piled six tiers in width; but denies that they were piled fifty-five courses high; defendant admits that said lumber was very heavy; defendant denies that the usual load placed upon said cars was from forty-five to fifty courses high, but in reference thereto specifically alleges that the loads varied according to the kind, size and dimensions of the timber, or the supply at hand and the load desired, and alleges that many of

the loads were from forty-five to fifty courses high; defendant denies that the load which collapsed and caused the death of Axel Sundin was largely higher than usual, or heavier than it was customary to place on said lumber cars.

XIII.

Answering paragraph thirteen defendant denies that the falling over or collapsing of said lumber pile from said car was due wholly or exclusively or at all to the carelessness or negligence of the defendant or its agents or servants in the manner in which said lumber was loaded upon said car or in any other particular or in any manner. Defendant denies that it was customary or usual or necessary in order to make said load of lumber safe from falling over that there should be inserted or laid between every few courses or in any manner at all, cross pieces crosswise of said car, so as to bind or hold said upright tiers of lumber or in order to prevent said lumber pile from falling over or collapsing. Defendant denies that said lumber pile would in that manner be held stationary or could then be moved in safety in the manner in which it was necessary to be moved and in which manner it was being moved at the time of said collapsing, in order to accomplish the results which said Axel Sundin and his associates were required to accomplish.

XIV.

Answering paragraph fourteen, defendant denies that it failed and neglected to place any cross pieces on said load, so as to keep the same from falling off,

or to secure said load in any manner, and denies that if said binders or cross pieces had been put on said load, the said load of lumber thereon could not and would not have fallen over and upon said Axel Sundin, causing his injuries and death.

XV.

Answering paragraph fifteen, defendant denies that said Axel Sundin had nothing to do with the loading of said car or handling of the same, except as mentioned in plaintiffs' complaint, and denies that Axel Sundin relied upon the performance by the defendant of its duty to load the said car so that it could be safely pushed over and upon said transfer car, or without danger of falling off or collapsing, and denies that he was performing the acts mentioned in said complaint, in assisting and pushing said car along said tracks, under the direct commands of Ed Moe, foreman of said company, or anyone else, and denies that in so doing the said deceased could not or did not anticipate or appreciate any danger in doing those acts which he was doing or which it was his duty to do, at the time of the happening of the accident.

XVI.

Answering paragraph sixteen, defendant denies that the surface of the transfer car, upon which it was the duty of said Axel Sundin or his associates to place said car of lumber, was constructed, used or maintained in a defective or unsafe manner, and denies that the track upon which said transfer car was standing was of such a height as to bring the

level of the transfer car to a point one inch higher than the level of the track upon which said car of lumber was necessarily transported over, and denies that there was any difference in the height of said tracks or that the difference in height was due to the irregularity of the ground over which the said transfer car track and lumber car track were built or maintained, or which could have been easily remedied and obviated in the exercise by the defendant of reasonable care; defendant denies that the condition of said transfer car track was due wholly or at all to the carelessness or negligence of the defendant, and denies that said condition was one of the contributing causes of the injury of and death to said Axel Sundin, and denies that if said track upon which said car of lumber was being transported, had been maintained on a level with the surface of the transfer car upon which said car of lumber had to be rolled or placed, no extraordinary or violent pushing of said car of lumber would have been necessary, or would have obviated the shock to said car of lumber, which added or contributed to the collapsing of said car of lumber or falling down of the tiers thereof.

XVII.

Defendant admits that if there was any difference in the height of the platform tracks and the height of the tracks of the transfer car, that said Axel Sundin knew of the said difference, and admits that the said Axel Sundin knew of the necessity for violent and extraordinary move-

ment of said car in order to overcome the obstruction caused by the difference in height; but denies that he complained to said Ed Moe, foreman, or to any other servant or employe of the defendant, of the condition of said track or transfer car, or of the necessity for the violent shoving of said car of lumber upon said transfer car, and denies that said complaint was made to said Ed. Moe, or to any other agent, servant or employe of the defendant, immediately upon being ordered to go around and assist in the movement of said car of lumber, or at any other time, and denies that the said Ed Moe, as foreman, or any other agent, servant or employe of defendant promised said Sundin that the same would be repaired in a few days or at all, and denies that said Ed Moe or any other agent, servant or employe of said defendant company then ordered said Sundin to go on or assist in the moving of said car, regardless of the condition of said track, and denies that any such order was peremptorily given, and denies that said Sundin knew that it meant his discharge from the service of the defendant company if he did not obey, and denies that said Sundin relied upon any promise of said foreman, while proceeding with the performance of his duties, as instructed by said foreman Moe, or did perform the duties required of him.

XVIII.

Answering paragraph 18 of said complaint, defendant denies that at no time did said Axel Sundin know of the failure of said defendant to place at certain

intervals, cross pieces at right angles of said load of lumber, so as to bind the same and thereby prevent the same from falling or collapsing and denies that the said Sundin could not have been so informed in the exercise of reasonable care by him.

XIX.

Answering paragraph nineteen, defendant denies that by reason of the facts set forth in plaintiffs' complaint, that the carelessness or negligence on the part of the defendant in causing the injury or death of said Axel Sundin, plaintiffs are or have been damaged in the sum of fifty thousand dollars (\$50,000.00) or in any sum whatever, but defendant admits that no part of said fifty thousand dollars (\$50,000.00) has been paid.

For defendant's first, further and affirmative defense and answer to plaintiffs' complaint herein, defendant states and alleges:

I.

That at the time said plaintiff met with said accident, he was a man of mature age and discretion and was thoroughly familiar with the location, manner of construction and manner of operation of the cars, trucks, tracks, platforms, piles of lumber, and all other machinery and equipment used in and around said platform and place of work occupied by said deceased at the time of the accident, and that he was entirely familiar with the manner of piling the lumber on said trucks and with the man-

ner of moving the same, and of the manner of placing the same upon said transfer cars and of taking the same over the transfer cars and entirely familiar with all of the methods of operation of said work in said lumber yards and was thoroughly familiar with all the dangers and risks in and around said piles of lumber, trucks, cars, and equipment and with the moving of said cars or trucks of lumber, and was thoroughly familiar with the danger of said piles of lumber falling from said cars or trucks and with all the dangers and risks of the work incident to the work he was engaged in at the time of the accident, and voluntarily accepted said employment and asked for said employment and remained in said employment and performed said work voluntarily, chargeable with knowledge of all the dangers and risks concerning the same, and assumed the risk of the injuries in the manner in which they were sustained.

For its second, further and affirmative defense this defendant alleges:

II.

That each and all of the injuries received by the deceased Axel Sundin and from which he died, and for which complaint is made in this action, were received as a result of the negligence and carelessness of himself approximately contributing thereto, and were not the result of any act for which the defendant is liable.

For a third further and affirmative defense this defendant alleges:

III.

That if any of the injuries received by the said Axel Sundin from which he died, were received as a result of the negligence of any other person than his own negligence, the same were due to the negligence of the fellow servants of the deceased, Axel Sundin, and for which this defendant is in no way responsible.

Wherefore, Your defendant prays that plaintiff take nothing by said action and that defendant recover its costs herein expended.

R. S. NELSON,

Attorney for Defendant.

Coeur d'Alene, Idaho.

State of Idaho,

County of Kootenai,—ss.

Huntington Taylor, being first duly sworn on oath, deposes and says:

That he is the general manager of the defendant, Edward Rutledge Timber Company, a corporation, and makes this affidavit on its behalf, that he has read the above answer, knows the contents thereof and believes the allegations therein contained to be true.

HUNTINGTON TAYLOR.

Subscribed and sworn to before me this 22nd day of March, 1917.

F. A. O'ROURKE,

Notary Public for the State of Idaho,

(N. P. Seal)

residing at Coeur d'Alene.

Service acknowledged.

Endorsed: Filed April 4, 1917.

W. D. McReynolds, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause.)

No. 672.

JUDGMENT.

This action came regularly on for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined and after the evidence had been closed, on motion of counsel for the defendant, the court instructed the jury to return a verdict for the defendant, and thereupon the following verdict was rendered: "We, the jury in the above entitled cause, upon instructions of the court, find for the defendant."

Wherefore by virtue of the law and by reason of the premises aforesaid, it is *Ordered and Adjudged* that the said defendant have and recover from the plaintiffs its costs and disbursements incurred in this action amounting to the sum of \$80.60.

Dated this 4th day of June, 1917.

W. D. McREYNOLDS,

Filed June 4th, 1917.

Clerk.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 672.

BILL OF EXCEPTIONS.

To the Clerk of the above entitled court, and to Ralph S. Nelson, Esquire, Attorney for defendant:

You, and each of you are hereby notified that the plaintiff in the above entitled cause hereby submits

and delivers to the Clerk of the above entitled court, plaintiffs' proposed Bill of Exceptions in the above entitled cause.

Dated at Spokane, Washington, this 28th day of June, A. D. 1917.

PLUMMER & LAVIN,
BLACK & WERNETTE,
Attorneys for Plaintiffs.

Service of a true copy of plaintiffs Proposed Bill of Exceptions, acknowledged this 29th day of June, A. D. 1917.

RALPH S. NELSON,
Attorney for Defendant.

This cause came on to be heard at Coeur d'Alene, Idaho, on Saturday, June 2nd, 1917, before Honorable Frank S. Dietrich, Judge of the above entitled court, and a jury, and the following proceedings were had, to-wit:

ANDREW MOE, produced as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. State your name.

A. Andrew Moe.

Q. Where do you reside, Mr. Moe?

A. 703 Government Way, Coeur d'Alene.

Q. Were you ever connected with the Edward Rutledge Lumber Company in this city?

A. Yes.

Q. In what capacity were you connected with that company, if at all, on the 15th of May, 1916?

A. Yard foreman.

Q. As yard foreman, what gangs of men did you have charge of?

A. The lumber pilers and chain and transfer men.

Q. Chain gang?

A. Yes.

Q. State whether or not Mr. Sundin, during his lifetime, at the time of his death, or the injury that caused his death, if he was under you?

A. Yes, sir.

Q. What gang did he belong to?

A. The transfer gang.

Q. Now the men that take the lumber after it comes from the mill,—it comes out on an endless chain, doesn't it?

A. Yes.

Q. And when that comes out from the mill, the men who take that lumber, what is that gang of men called?

A. We generally call them chain men.

Q. And the men who move the cars after they are loaded by the chain men, out to this other track, out to the end of the short tracks, what is that gang called?

A. That is the transfer gang.

Q. Had the transfer gang anything to do with the chain gang?

A. No, not particularly, no.

Q. In other words, the transfer gang does not have anything to do with loading the cars at all, does it?

A. No.

Q. What do the transfer gang do with reference to this loaded lumber, after the chain gang have loaded the cars?

A. Shove it out and put it on the transfer track and run it out in the yards.

Q. And I believe you said Mr. Sundin was a member of the transfer gang?

A. Yes, sir.

Q. How long had he been a member of that gang in that yard under you, Mr. Moe.

A. Ever since the mill started, the 3rd day of April, I guess, Monday morning, it started.

Q. The April preceding the time he was killed, you mean?

A. Yes.

Q. State whether or not you had charge of this chain gang and the transfer gang, as to their duties and their work?

A. Yes, sir.

Q. How many tracks were there paralleling or running at right angles with this endless chain arrangement you spoke of?

A. I think there was seventy on one side, and I think there was sixty-eight on one side, I believe; I aint sure, but I think about that.

Q. About seventy on the side Mr. Sundin was working on?

A. No. He worked on the short side; that was sixty-eight, I think.

Q. How long were those tracks?

A. Oh, on the south side they were probably twenty-five or thirty feet.

Q. How long on this side this car was on?

A. That is the side I mean, the south side.

Q. You say about twenty-five or thirty feet?

A. Something like that probably.

Q. Anyhow, they were short tracks?

A. Yes, short tracks.

Q. When the transfer gang would move these cars of lumber over to the end of those short tracks, what was necessary in order to get the cars up on that transfer car?

A. Shove it up.

Q. Was there a track on the transfer car?

A. Sure.

Q. State what the fact is with reference to the whole car, lumber and all, being shoved on to the transfer car?

A. Certainly.

Q. What was the custom there during the time you worked there as foreman and the time Mr. Sundin worked there, with reference to the men who loaded the cars, the chain gang, putting cross pieces or what you call binders at different intervals between these boards on this car for the purpose of holding it together?

A. That was the orders to all the men on the chain.

Q. It was the custom to do that in that yard, was it?

A. Yes.

Q. Had you yourself moved the cars there, these cars that I have described, these short cars?

A. Yes, sir, lots of them.

Q. And when those cars were moved, when there was a heavy load, for instance, and there was three men on the end shoving, where was it customary and usual for the other man who had to help to have hold of the car?

MR. NELSON: We object to that as incompetent, irrelevant and immaterial, no custom having been alleged in the pleading, and they can't base any negligence upon it.

MR. PLUMMER: We are not basing any negligence on the fact that he was in the wrong place.

THE COURT: He may answer. The objection is overruled.

MR. NELSON: An exception.

A. Any place that he could get hold of it.

MR. PLUMMER: Q. State what the fact was before Mr. Sundin's death, if it was frequently the custom for men to get hold of the car like that (illustrating), with his back to it?

A. It was sometimes.

Q. And did you do that yourself sometimes?

A. Yes.

MR. NELSON: I object to the leading of the witness.

THE COURT: Yes, it is leading.

MR. PLUMMER: I will change the form of the question. He has answered already.

THE COURT: He has answered this. You needn't go over it again, but avoid leading questions.

MR. PLUMMER: Yes, I will, if your Honor please.

Q. What is the fact, Mr. Moe, at the time that Mr. Sundin was killed, or just before he was killed, when they were moving those cars out, whether or not the work was being rushed at that time by the men under your instructions or directions?

A. Oh, not any more than generally. We always had all we could do.

Q. Was it generally the custom to rush it?

MR. NELSON: We object to that as incompetent and immaterial.

THE COURT: What do you mean by rush?

MR. PLUMMER: Crowd and hurry the work along.

THE COURT: You mean unreasonably?

MR. PLUMMER: No, I don't know what would be a reasonable—

THE COURT: You don't allege any failure on the part of the defendant in that respect, do you?

MR. PLUMMER: No.

THE COURT: The objection is sustained.

MR. PLUMMER: I would like to put it in different form then, if the form is objectional.

Q. Were or were not the men required to work rapidly in the performance of their duties there in taking these cars out?

MR. PLUMMER: The purpose of that is to show why, even if it were possible for Sundin to have seen the absence of these strips, it is a circumstance indicating that he wouldn't probably observe them if he was rushing along with the work and had to hurry through the work, as distinguished from his taking his own time.

THE COURT: In the absence of some other showing it will be presumed that they worked with reasonable agility.

MR. PLUMMER: Q. About how many strips, that is, take a load now composed of six tiers, of one by six, sixteen feet long, that kind of lumber, there would be about six tiers, wouldn't there, on a car?

A. Yes, six tiers.

Q. And about how high?

A. Oh, sometimes forty-five and sometimes fifty.

Q. Fifty boards, you mean?

A. Yes, high, I mean.

Q. Fifty boards high?

A. Yes, sometimes more than that.

Q. That would be forty or fifty inch board from the floor of the car?

A. Yes, sir.

Q. About how many strips do you usually put through cross-ways between the boards as binders to hold them on?

MR. NELSON: We object to that as immaterial. They allege that in this load there were no strips. They have alleged that it was the custom to put in strips and the number, I think, is wholly immaterial

and in the load they complain of they allege that there were no strips.

THE COURT: He may answer.

MR. PLUMMER: Q. About how many?

A. That depended a good deal on the kind of lumber it was.

Q. The kind of lumber I have just described to you, wet, green lumber?

A. Two and three and four sometimes.

Q. What were they put through there for?

A. Put there to hold the load together, of course.

Q. I believe you stated that they were laid cross-ways from the way the lumber itself was laid?

A. Yes.

MR. PLUMMER: Take the witness.

CROSS EXAMINATION by

MR. NELSON:

Q. Who employed Mr. Sundin, Mr. Moe?

A. I did.

Q. When you employed him where did he first work?

A. He worked out in the yard, helped building the track.

Q. And you say he went to work on the transfer platform on April 3, 1916?

A. Yes, sir. That was on Monday, wasn't it?

Q. Yes, on Monday, April 3rd?

A. That's right.

Q. Mr. Moe, what statement as to experience did Mr. Sundin make when you employed him? What experience did he say he had had as to similar work?

MR. PLUMMER: I object to that as not cross examination. That is a matter of defense, assumption of risk, and couldn't be for any other purpose.

THE COURT: That would seem to be true, would it not, Mr. Nelson? Is this germane to any other matter to which he testified?

MR. NELSON: He testified that he was his foreman, and that he put him to work there and had charge of him. Now as to whether or not he would put an inexperienced man there or not, or what experience this man had had—

THE COURT: It isn't claimed yet that he was an inexperienced man. There is no evidence of that. The objection is sustained.

MR. NELSON: We except.

Q. You saw Mr. Sundin working around there from the time you employed him up until the time he was injured, did you, Mr. Moe?

A. Yes.

Q. Daily?

A. Every day.

Q. State whether or not you could tell from observing him whether or not he was an experienced man.

MR. PLUMMER: We object to that as not cross examination, and no issue upon that point.

THE COURT: Sustained.

MR. NELSON: We except, if Your Honor please.

THE COURT: It will be understood that counsel have exceptions to all adverse rulings.

MR. NELSON: Q. This was Monday morning, I believe, when this accident happened?

A. Yes, Monday, between nine and ten, I should judge.

Q. Between nine and ten?

A. Yes.

Q. And the week before Mr. Sundin had been on the night shift, had he not?

A. I think so.

Q. And he went to work that morning at what time?

A. At seven o'clock.

Q. And did you work with him that morning?

A. Yes, I helped him some.

Q. Who else worked with you and Mr. Sundin in moving these cars of lumber?

A. Harry Brewsted and Sam Knudson.

Q. What time did you say he went to work that morning?

A. Seven o'clock.

Q. What work did you do when you went to work at seven o'clock?

A. Taking out loads.

Q. This load that fell then wasn't the first load that was taken out that morning, was it?

A. No.

MR. PLUMMER: I didn't say it was,—on that track.

MR. NELSON: I misunderstood you then.

Q. Then you had taken out a good many loads that morning?

A. Yes, sir.

Q. Did you help move this load that fell?

A. No, sir.

Q. Now in regard to these cross-pieces,—the men working up on the chain shed put in the cross-pieces on the load, did they not?

A. Yes, sir.

Q. And where were these cross-pieces kept, so that they could get them and put them in these loads?

A. They were kept overhead, different places, where they would be handy to get them.

Q. Convenient to where they worked?

A. Convenient to where they worked.

Q. There was a supply kept on hand all of the time, and whenever they wanted one or thought one ought to go in the load they could get it and put it in the load?

A. Nearly all the time they were there.

Q. How much experience, Mr. Moe, have you had in handling trucks of lumber similar to this one that fell?

A. About twenty-four or twenty-five years.

Q. About how much of the lumber fell from off that load, Mr. Moe?

A. I didn't count them, but it must have been something about a hundred pieces, or a little more probably.

Q. And it fell from one corner of the load, did it?

A. I couldn't tell, because when we got there the load was all torn to pieces, and I couldn't tell where it come from.

Q. Mr. Moe, when a man of ordinary experience in handling lumber or trucks of lumber is at the side

of one of those trucks of lumber such as the one complained of in this case, can he tell by casual observation of that load of lumber whether or not there are any cross pieces in the load?

MR. PLUMMER: We object to that as not cross examination, and it is a part of their defense, if Your Honor please.

THE COURT: Overruled.

MR. NELSON: Answer the question.

A. I don't know whether anybody else could tell, but I could generally tell by a glance of the eye.

Q. Could the ordinary man who had had experience in loading lumber and shoving these trucks for a month or six weeks or longer tell by a casual examination of it from the side of it as to whether or not there were cross pieces in that load?

MR. PLUMMER: If Your Honor please, I think that is objectionable for two or three different reasons. One is that it calls for a conclusion, and the next is that it seems to me that is one of the questions this jury can decide, and it is not the subject of expert testimony. It seems to me we should let the jury say whether or not under all the circumstances he should have seen it.

THE COURT: This isn't a question of what ought to have been done; it is a question of what could have been done.

MR. PLUMMER: Wouldn't that be his conclusion? It seems to me he could say how they were and let the jury say whether or not he could see them.

THE COURT: I think this is a more direct way

of getting at it. I think it is a case where he can state his conclusion.

MR. NELSON: Read the question to the witness.

(Last question read.)

A. He could if he thought of it and looked for them.

Q. If he had thought of it and looked by a casual glance at the load he could have told?

A. Yes, sir.

Q. Mr. Moe, you say you have had some twenty or twenty-five years of experience in handling trucks of lumber similar to this?

A. Yes, something like that.

Q. I will ask you, Mr. Moe, whether or not in your opinion you would consider it reasonably prudent for a man experienced in the handling of trucks of lumber similar to this to go alongside of a truck of lumber fifty tiers high, of six-inch white pine, one by six, sixteen feet long, fifty or more tiers high, without any cross pieces in it, and use his back, put his back up against that load of lumber and try to move it?

MR. PLUMMER: We object to that, if Your Honor please, on the ground that it isn't cross examination and calls for a conclusion.

THE COURT: Sustained.

MR. NELSON: May I ask the court if it is on the ground that it isn't cross examination?

THE COURT: Yes.

MR. NELSON: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Moe, you were asked about the ability of a man to see whether or not there were cross pieces in between these boards, and you answered, if he looked for them. Now what is the fact with reference to before those cars are moved out? The car that is moved out is in between other cars loaded with lumber?

A. Yes, sir.

Q. And how much space is there between the lumber on one car and the lumber on the other?

A. There aint much.

Q. About six inches, isn't it?

A. Well, sometimes—

THE COURT: Don't lead him, Mr. Plummer.

MR. PLUMMER: Q. How far is it?

A. Sometimes six inches, sometimes more, and sometimes less; I can't tell,—according to how wide they build the load.

THE COURT: Well, if the cars are so close together as that, how does a man get to the side of the car to push it?

A. They aint supposed to go alongside of it. They are supposed to go behind it and shove it up.

Q. If there were three men shoving from behind, and another man goes along the side, as you have described, could he get hold of the side until the car—

THE COURT: Mr. Plummer, you will have to refrain from these leading questions, or I will not permit you to examine at all.

MR. PLUMMER: I will. I beg the court's pardon.

Q. When does this man that takes hold of the side, when does he take hold of it?

A. I don't know.

Q. When do they ordinarily take hold of it, when they catch hold of the side as you have described they did, when does he take hold of it?

MR. NELSON: If Your Honor please, I object to that.

THE COURT: The objection is sustained.

MR. PLUMMER: I understood the court to ask him how he could get hold of it, and he said he was supposed to get behind.

THE COURT: Yes. Now you are assuming that ordinarily they get hold of the side.

MR. PLUMMER: Well, he said they did.

THE COURT: No. He answered a sort of a general complex question in which that was involved possibly, but you exhibited to him how you thought perhaps it was done. But you may ask him, if you want to, the direct question as to whether that is customary.

MR. PLUMMER: Yes.

Q. Mr. Moe, assuming that there are three men behind shoving, and no room for any more, where does the fourth man, if he does help shove the car out, take hold of the car ordinarily, according to the custom in vogue.

THE COURT: No. Mr. Moe, is it customary for men who operate those cars to get hold of them on the side or not?

A. It is customary part of the time.

MR. PLUMMER: Q. When they get hold of the side when do they take hold?

MR. NELSON: If Your Honor please, I object to that unless he puts his question, assuming that the witness took the position he says this man took on the side of the load, with his back to the load. It isn't a fair question otherwise.

MR. PLUMMER: I can't prove my case by one witness. He wasn't there.

MR. NELSON: He has already alleged in his opening statement, and the proof shows, that this man put his back to that load when he took hold of the car, and I think it is immaterial as to what other men might do in that case.

THE COURT: Is it customary for men to take hold of the side of the car in the manner suggested by counsel, by putting their backs against it, and moving it this way?

A. They do sometimes.

THE COURT: They do sometimes?

A. Yes.

THE COURT: You may proceed.

MR. PLUMMER: Q. Now again, when the man takes hold as the court has referred to in his question, with his back to it, when does he take hold of the car?

THE COURT: In that way. Where is the car, in what position is it when he takes hold in that way?

A. It has got to be outside of the other loads. He can't get in and get hold of it between the loads.

MR. PLUMMER: That is what I understood.

Q. You were asked the question,—I don't know whether it was made clear or not by counsel's subsequent questions,—as to whether or not you helped Sundin that morning. Did you help him move any lumber that morning?

A. Yes, sir.

Q. On this track?

A. No, not on that track.

Q. Do you know whether or not that was the first or second or third load that was moved on that track that morning?

A. I think it was the first.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. NELSON:

Q. Mr. Moe, do you know whether or not is is customary for a man to place his back up against a load fifty tiers high, in which there were no cross pieces, that was being moved down onto the transfer track? Would that be customary under your observation during your time there as foreman.

MR. PLUMMER: If Your Honor please, I object to that on the ground that it isn't shown so far that it was customary to have cars without the pieces in them. Therefore it wouldn't be proper cross examination.

THE COURT: No, it isn't shown, nor is it shown that it was customary for men to take hold of a car in this way. He said it was sometimes done. He also stated that they weren't supposed to do it.

MR. NELSON: We will withdraw the question, if Your Honor please. That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Moe, assuming that there were three men shoving the car out from between the other cars, and no more room on the end of the car so that men could get there to shove, and Mr. Sundin was called to help move the car out, and those other three men were already stationed at the end, where was it Mr. Sundin's duty to take hold of the car?

MR. NELSON: If Your Honor please, we object to that as assuming facts not proven, and not in accordance with the allegations in this case, and one of the questions for the jury to decide, as to whether or not there is room on the rear of the car for four men to shove.

THE COURT: Objection sustained.

MR. PLUMMER: Does the court hold that we can't show that it was his duty?

THE COURT: You can't show it now anyway. It may be that the facts will develop so as to make the proof proper later.

MR. PLUMMER: That is all then, Your Honor.

MR. NELSON: That is all the cross examination I have at this time, in view of the statement in the pleadings and the statement of counsel.

THE COURT: I want to ask you a question, Mr. Moe. You have stated that sometimes men take hold of the car in the manner illustrated by counsel, and you also stated that they weren't supposed to do that. What do you mean by that? Did you have some rule that the men were supposed to follow or observe?

A. If a man saw that there was no cross-pieces in it, it was no place for him.

THE COURT: But did you have any rule governing the men, or which was supposed to govern the men, as to how they should move this car, where they should take hold of it?

A. No, sir.

THE COURT: That is all.

MR. PLUMMER: That is all.

MR. NELSON: That is all.

MR. PLUMMER: I will call Mr. Brewsted.

HARRY BREWSTED, produced as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. State your name.

A. Harry Brewsted.

MR. PLUMMER: If Your Honor please, this witness understands the English language fairly well, but not altogether.

THE COURT: Suppose we try him. Avoid adjectives and qualifying words as much as possible, and see if we can't get along. If we need an interpreter we will call him.

MR. PLUMMER: Q. Where do you live.

A. 1323 Mullan Avenue.

Q. This city?

A. Yes, sir.

Q. Who are you working for?

A. Working for the contractor.

Q. You are not working for the Rutledge Lumber Company now?

A. No.

Q. Did you know Mr. Sundin?

A. Yes.

Q. How long did you know him?

A. I seen him up there one time, working there.

Q. Do you know whether or not he ever worked in the Rutledge Lumber Company's mill here, or yard here? Did he work in the yard here of the Rutledge Lumber Company?

A. No, I work on the yard before they start the mill.

THE COURT: You may call your interpreter, I think. What language does he speak?

MR. PLUMMER: Norwegian.

(The interpreter called was thereupon sworn.)

MR. NELSON: If the Court please, may I learn the name of the interpreter, and who he is, and where he lives?

THE COURT: Yes.

MR. PLUMMER: What is your name, Mr. Interpreter?

THE INTERPRETER: Oscar Moberg.

MR. PLUMMER: And where do you live?

THE INTERPRETER: 1311 Coeur d'Alene Avenue.

MR. PLUMMER: Now, Mr. Moberg, I will ask the questions of the witness just like I was talking to him. I wont ask you to ask him so and so. You just repeat what I say.

Q. Did you know Axel Sundin during his lifetime?

A. Yes.

Q. Do you know whether or not Axel Sundin at any time worked in the yard of the Rutledge Timber Company?

A. He said he don't know before he started to working with him.

Q. I didn't ask him when he started to work. They admit in the pleadings that he did work there. Did you know Mr. Sundin when he worked for the Rutledge Timber Company in the yard as a transfer man?

A. Yes.

Q. State whether or not you were present at the time he was injured.

A. Yes.

Q. Were you at that time working for the same company, in the same yard?

A. Yes.

Q. What were you doing, what kind of work?

A. I worked on the transfer cars.

Q. State whether or not you were working on the same transfer car that Sundin was working on at the time he was hurt?

A. Yes.

Q. What other men, if any, were working on this same transfer car that you and Sundin were working on?

A. Knudson and Hegstrom was working with him at the time.

Q. Do you know where Knudson is?

A. He is dead.

Q. When this car of lumber was being moved out how many men were on the end of the car, if any, shoving it?

A. Three.

Q. And I assume that was Hegstrom and Knudson and himself, is that correct?

A. Yes.

Q. Was or was not there any room for any other men on the end of the car?

A. No.

MR. NELSON: If Your Honor please, this witness is answering Mr. Plummer's questions right off.

MR. PLUMMER: Once in a while he does.

THE COURT: I haven't any doubt that he understands Mr. Plummer. The difficulty is in understanding him. I think he understands very well, and if it were not for the difficulty of understanding his answers I would dispense with the interpreter.

MR. PLUMMER: The testimony will be very short. It won't be very long.

Q. Describe on the end of this table how you and the other two men shoved the car out from between the other cars of lumber. Come over here.

(Witness indicated the position with his back to the table.)

Q. When did Sundin take hold of the load?

MR. NELSON: We object to that unless he knows.

A. He says after he get it out far enough so that he could get hold in between the beams on the truck.

Q. State whether or not you saw Sundin take hold of the load to help push it up and shove it out?

A. Yes.

Q. What part of the load did Sundin take hold of? I want to find out whether he took hold of either end, or where, along the side?

A. In the middle, between the two beams.

Q. Just show the court and jury here at this table how he took hold of it.

(Witness indicated with back to table.)

Q. State whether or not that was the usual way that men took hold of the cars when they took hold of the side?

MR. NELSON: We object to that as incompetent, irrelevant and immaterial, and not within the issues in this case.

THE COURT: Overruled.

MR. NELSON: An exception.

A. He caught hold wherever he had a chance to.

Q. He didn't answer my question. I didn't ask him where, but how, they took hold.

THE COURT: Ask him how they generally took hold.

A. He said it was customary to take hold wherever they could get a chance.

Q. Tell him to show the jury how the men usually took hold of it when they took hold of the side of the car at all.

A. This way (indicating).

Q. How long did that custom exist there?

MR. NELSON: We object to that as incompe-

tent, irrelevant and immaterial, and not pleaded, and the defense has had no opportunity to meet it.

THE COURT: Sustained. He need not answer.

MR. PLUMMER: Q. How long did you work in the yard there as a member of that transfer gang?

MR. NELSON: I submit, Your Honor, that he has already answered that, that he began working there when the mill opened.

A. He has been working since the mill started last year.

MR. PLUMMER: Q. What kind of lumber was on this car, part of which fell off and caused the injury that produced Mr. Sundin's death?

THE COURT: Is that in controversy, Mr. Nelson?

MR. NELSON: No.

A. One by six, sixteen feet.

MR. PLUMMER: Q. One inch thick and six inches wide?

A. Yes, and sixteen foot long.

Q. How many tiers of that lumber was there on the car?

A. Six tiers.

Q. And how many boards high from the floor of the car?

A. Fifty-six or fifty-five, between fifty and sixty, something like that.

Q. How high was the floor of the car from the rail that the wheels stood on?

A. About two feet.

Q. State whether or not you and the gang you

were working with, known as the transfer gang, had anything to do with reference to putting strips or binders or cross-strips through the load as it was being loaded?

A. No.

Q. After the load had been shoved out from between the other loads and Sundin had got hold of the load as you have described, how far did the load go, being shoved by you four men, before some of it fell off?

MR. PLUMMER: It is admitted that some of it did fall off, Your Honor.

A. He says it went about three feet in on this transfer car before it fell off.

Q. Well, he didn't quite understand me, I guess. How long was this track that this car was on, that the car of lumber was on?

A. Twenty-two feet.

Q. And how long was the car itself? I don't mean the lumber, but the car itself?

A. Eight feet.

Q. Was there or was there not any straps or binders put in on this load at all?

A. There was none at all.

Q. Were you present when the lumber fell off?

A. Yes.

MR. PLUMMER: I believe you admit that the lumber killed him, don't you?

MR. NELSON: Yes, we admit that he was killed by the fact of the lumber falling off.

MR. PLUMMER: Q. When you got to this

transfer car, we will call it, at the end of the track, you and the gang with you, including Sundin, what did you and the gang do, if anything, with reference to attempting to shove the car up on to the other car?

A. They took it back and started it again, to get it up there.

Q. Just tell him to describe just how they did that.

A. He says three of them went behind, and Sundin was on the side, and they took a little start to get her there.

Q. And when they took this start to get it over and it struck the other rail, that is, the rail on the car, what happened then?

MR. NELSON: If Your Honor please, I think the witness—

THE COURT: What does he say, Mr. Interpreter?

INTERPRETER: I want him to explain to me what happened, when he asked me if it was when the lumber got on the car and when it fell.

THE COURT: Tell him to just go on and explain to us what happened from the time they started the car until after the lumber fell, tell it in his own language, and you can repeat it to us.

A. He says they pushed the car so that when it hit the rail and went over, that is when it tipped, when it bumped up on this rail it was higher, and went over on this transfer car, was then the load tipped.

MR. NELSON: We move to strike that out as not responsive to the question, if the court please.

MR. PLUMMER: Oh yes, it is.

THE COURT: Oh, it is responsive.

MR. PLUMMER: Q. State whether or not that lumber that you say tipped was the lumber that fell on Sundin?

A. Yes.

Q. Did you work Saturday in the yard there, doing that same kind of work, the Saturday before Sundin got hurt?

A. Yes.

Q. What shift was you on?

A. He was on the day shift.

Q. State whether or not you saw the tracks there where the accident occurred on Saturday?

A. Yes.

Q. What is the fact with reference to whether one of the tracks was higher—

THE COURT: No.

MR. PLUMMER: Q. Describe the condition of the tracks there.

MR. NELSON: If Your Honor please, I can see how under some issues this would be material, but under others, under the allegations in the complaint, I don't believe it is material in what condition it was on Saturday, unless they are going to connect it up.

MR. PLUMMER: We will connect it up.

THE COURT: I assume that they will connect it up. What does he say, Mr. Interpreter?

A. He says the track on the transfer car was higher than the one on the platform on Saturday.

MR. PLUMMER: Q. How much higher on Saturday?

A. Three-quarters of an inch.

Q. Did you see the same track on Monday, after the accident occurred?

A. Yes.

Q. Describe the condition that you saw there with reference to these tracks on Monday

A. He says it had sunk more then.

Q. How much more?

MR. NELSON: We object to that unless it is before the accident.

A. It was after the accident.

THE COURT: Ask him when he noticed the track on Monday.

MR. PLUMMER: Yes.

A. It was after the accident happened.

Q. How long after?

A. After they sent Sundin to the hospital.

Q. Tell him to describe how much lower it was on Monday when he saw it right after the accident than it was on Saturday.

MR. NELSON: We object to this as immaterial and incompetent, and not within the pleadings in this case.

THE COURT: Overruled. It is in the pleadings that the track was lower, isn't it?

MR. NELSON: Yes, but not that there was a difference between Saturday and Monday. He al-

leged in his complaint that he knew of it, and I took it from his opening statement that he is going to now rely that he was surprised, owing to the difference in the track, and therefore we allege that it is incompetent.

MR. PLUMMER: The plaintiff doesn't allege that Sundin knew of the difference between Saturday and Monday. He says that he knew it was uneven and that one was lower than the other.

THE COURT: Well, unless you allege this I can't permit you to offer it then.

MR. PLUMMER: I alleged that it was lower and the condition of the track was what caused the necessity for this extra shoving of the car to get it on there.

THE COURT: But you alleged that he knew the condition, didn't you?

MR. PLUMMER: I didn't allege that he knew the condition. I alleged that he knew the track was uneven, but the extent of it I didn't say that he knew.

THE COURT: The objection is sustained. You say that while he knew of the difference in height of said track of said transfer car, and the necessity for violent and extraordinary movement of said car, etc.,

MR. PLUMMER: If Your Honor please, it seems to me that that isn't an allegation that he knew the extent of the unevenness and the danger that would result from the combined conditions. He might know that this track was uneven, and at the same time appreciate the fact that if there were binders in there it wouldn't make any difference.

THE COURT: That may be, but that is an entirely different question. If it makes no difference, then it is wholly immaterial to go into it.

MR. PLUMMER: There is this, if Your Honor please: Counsel are going to contend, I assume, from the motion he made after the opening statement, that the men who neglected to put the strips in there, if they did neglect it, were fellow servants. That is a point we will have to argue before Your Honor, I presume. We have a right to show, if Your Honor please, even if the court should take that view, that it was the concurrent negligence of the master and the fellow servant, and the condition of this track is material there for that purpose.

THE COURT: That may be, but that gets back to the question again that was raised before the trial commenced. You come in and present this showing in the complaint. Now at the last moment, just before the jury is called, you desire to withdraw from this statement. Counsel say they have prepared their case upon the theory presented by your complaint, which is very clear, that is, that while he knew of this, still there had been promise to correct it. Now I can't permit you to withdraw from that theory and take an entirely different one, which is now suggested.

MR. PLUMMER: I don't intend to suggest that, if Your Honor please, that is, altogether. My theory is this, that if we are bound by paragraph 17, if the court is going to let it stay in, it shouldn't be construed any stronger against us than the pleadings

would justify. We allege that he knew of the unevenness of the track. It doesn't say that he knew of the extent of it. He did know that it was uneven to some extent. Assuming that he did know that, and assuming that we are unable to show a promise to repair, which I assume we will not be able to show, then the only part counsel desired to remain in there is the first part of it, that says that he knew of the unevenness. The balance is immaterial, of course, so far as he is concerned. It is the admission in there of Sundin's knowledge of the unevenness that counsel wants to stay in. Assuming that that is left in, it amounts to simply the bare allegation that he knew that the track was uneven. Assuming that that is true, it shouldn't be broadened out to the extent that he knew of the unevenness to the extent that it was found to be uneven on Monday, because that was the first load he took out on Monday morning, as the evidence shows here.

THE COURT: But you allege that he knew of every condition which you allege existed, so that if you take that view then you don't allege that it was in worse condition on Monday than it was on Saturday. In other words, you allege first that the track was uneven.

MR. PLUMMER: Yes.

THE COURT: Then your averment of knowledge of that condition is just as broad as the averment of the condition, so that if you take the view that this does not refer to the condition on Monday, then neither does the other allegation allege the condition

on Monday. One seems to be just as broad as the other.

MR. PLUMMER: I see the court's position. That might mean that it isn't alleged specifically in the complaint as to what the condition was on Monday. I presumed the complaint was barren of that allegation, but as I suggested to Your Honor, sometimes we find things out afterwards that we didn't know before. There was no intention to mislead anybody.

THE COURT: That may be, but counsel knows that these cases are very often tried very closely, and that there is often merely a straw between the legal right to submit a case to the jury and the want of that right, and of course if we permit an amendment at this time it may change the whole aspect of the case.

MR. PLUMMER: Yes. I don't want to ask for an amendment so as to have the case continued, or anything of that kind, but this was the thought that I had in mind, that even if he did know of the exact condition of the rails, even to the fullest extent, even Monday, that of course would not charge him with assumption of risk, that is with knowledge of the danger incident to the condition of the rails, combined with the failure to load the load safely, because he would have to have knowledge of both concurring conditions in order to assume the risk of the accident that happened.

THE COURT: Of course that is a question of law that I will hear you upon if you desire when the proper time comes. I can't see that that is necessarily involved at the present time.

MR. PLUMMER: That is all.

MR. NELSON: Shall I proceed, Your Honor?

THE COURT: Yes.

CROSS EXAMINATION by

MR. NELSON:

Q. Where do you live, Mr. Brewsted?

A. 1323 Mullan Avenue.

Q. With whom do you live? Are you a married man?

A. No.

Q. With whom do you live, or board?

A. Mrs. Sundin.

Q. How old a man are you?

A. Thirty-five years.

Q. You say you knew Alex Sundin in Libby, Montana?

A. Yes.

Q. For whom did Sundin work in Libby, Montana?

MR. PLUMMER: I think I shall object to that as not cross examination.

THE COURT: I suppose this goes to his knowledge of the business. The objection is overruled.

A. I worked in the dry shed there, when I see him, for the Libby Lumber Company.

Q. Ask him if he didn't load lumber from off of trucks or carts into cars at Libby, Montana, and as a part of that work move these carts of lumber around on the platform?

MR. PLUMMER: We object to that as not cross

examination. It is immaterial as to what they did in some other yard back east.

MR. NELSON: Just to show, if Your Honor please, that he was an experienced man.

THE COURT: He may answer. The objection is overruled.

A. He didn't see any of that because he didn't work in that yard.

THE COURT: The witness didn't?

INTERPRETER: No.

THE COURT: Put your questions directly.

MR. NELSON: Q. Under what foreman did you work at Libby?

INTERPRETER: George Erickson?

THE COURT: Mr. Interpreter, you must just repeat what he says. You must not suggest his answers.

INTERPRETER: He says he worked for the chain foreman. I was working there at the same time, under the same foreman as him.

THE COURT: Yes, but you aren't permitted to testify at this time.

MR. NELSON: Q. Ask him if he ever saw Sundin at Libby, Montana, working or moving trucks of lumber up to the car and loading it into the car?

A. He never seen it.

Q. Come to this table, and supposing this table was the truck of lumber that you was working on when Sundin was hurt, and come here to this end of the table, and show the position that you were in, that Hegstrom was in, and that Knudson was in,

at the time you pushed that truck out. You were pushing it south, weren't you? Were you pushing the truck of lumber south?

A. He pushed it towards the lake.

Q. Go to the other end of the table and show *were* you were at the end of that truck of lumber supposing this table to be the truck of lumber what position you were in. This was at the end of the truck of lumber?

A. Yes (indicating).

Q. Where was Knudson?

A. I think Kundson was over here.

Q. At this corner?

A. Yes, sir.

Q. Was he in this position (indicating)?

A. Yes.

Q. Where was Hegstrom?

A. In the middle.

Q. In the middle?

A. Yes.

Q. Was he with his back against the end of the load of lumber also?

A. Yes.

Q. You shoved away from the transfer shed which ran along here at the end of this load, did you not?

A. Yes.

Q. Did you get that load to going pretty fast?

A. He says it went pretty good until it got over towards the transfer car.

Q. It went pretty fast until it got to the end of the transfer car?

A. It didn't go very fast, but it went all right.

Q. It kept going all right?

A. Yes.

Q. In which direction was your face when you were pushing that car out from the chain shed?

THE COURT: What do you mean by that? He has showed you how he stood.

MR. NELSON: Q. Was your face towards the chain shed, this way, when you were pushing?

A. He says when they started the load.

Q. In what position did you change?

A. He says he turned around the minute it started to go up on the transfer car, then he turned around.

Q. He turned around when it went up on the transfer car?

A. Yes, sir, with the first two wheels.

Q. You did not turn around until the truck you were pushing went up on to the transfer car?

A. He says he turned his head alongside of the load so he could see.

Q. When did you do that?

A. He was looking alongside that load that he was pushing out.

Q. Where was the load when you first turned your face alongside of it?

A. He says he can't tell exactly how far it was.

Q. Was the load up on the transfer car? Were two wheels of the load up on the transfer car?

A. He says the minute it went up on the transfer car he turned himself.

Q. Is that the first time you turned and looked along the transfer car, when the two wheels went up on the transfer car?

A. No.

Q. When did you first turn and look along the side of the car you were pushing?

A. He says he can't tell exactly the first time he turned.

Q. As nearly as possible, tell me where the car was that you were pushing when you first turned and looked towards it?

A. He says when it stopped by the transfer car the first time.

Q. When it stopped by the transfer car the first time?

A. Yes.

Q. Had the car been going all the time from the time you first began shoving on it until it went up on to the transfer car?

A. Yes.

Q. How many times did you push it up against the transfer car?

A. Three times.

Q. What position were you in the second time you pushed the car of lumber up against the transfer car?

A. He says he had his back to it until he come to the transfer car, and then he turned around and pulled it back again.

Q. That was the second time?

A. The second time.

Q. What position were you in the third time when you pushed the car of lumber up against the transfer car?

A. He had his back to the load, he says.

Q. How long a time did it take from the time you began shoving the car away from the transfer shed, was it until Sundin was injured?

A. About three minutes.

Q. About three minutes?

A. He says it wasn't a long time, about three minutes, he says.

Q. What did Sundin do when you began pushing the load back towards the transfer shed?

A. He helped push it back.

Q. What position did he take when he helped push it back to the transfer shed?

A. He says he stood on the same side, with his back towards the load.

Q. Did this load that you were pushing away from the transfer shed stop at any time during those three minutes?

A. It stopped up against the transfer car, and they pushed it back and took a new start on it.

Q. Did you stop and get your breath when you did that?

A. No.

Q. How long at any time did the car remain still during those three minutes that you were pushing it from the shed up on to the transfer car?

A. He says he didn't know how long it was still.

They just changed and pulled her back as soon as they bumped up against the car.

Q. Was Sundin in about the middle of the car from end to end, on the side of it?

A. He says he was between the two beams of the truck.

Q. That is about the middle of the car, is it not?

A. Yes.

Q. Ask him how many tiers of lumber there are usually above the last cross piece in a load of fifty to sixty tiers high?

A. He says there is a difference, sometimes more and sometimes less.

Q. A difference in loads,—sometimes there are twenty or thirty tiers, are there not, above the last cross piece in a load of from fifty to sixty tiers high?

A. No, he says.

Q. How many, about?

A. From four to six.

Q. How many cross pieces then would there be usually in a load of from fifty to sixty tiers high?

A. He says it all depends on the width of the lumber.

Q. In six inch lumber, one inch thick, six inches wide, sixteen feet long?

A. He says you can put up to half a dozen.

Q. Are there usually six cross pieces in a load of six inch lumber, white pine, of from fifty to sixty tiers high?

A. He says he has seen up to about five or six in a load of that size.

Q. Ask him if that is what is usually in a load of that size.

A. Yes, he says.

Q. Usually how far do these cross pieces stick out at the side of a load?

A. He says sometimes they are even, and sometimes they are inside.

Q. Do they not usually stick out about four to six inches from the side of the load?

A. He says he hasn't hardly seen that, he says. He says they lay that piece right kitty-cornered over. He says lots of times you can see them and lots of times not.

Q. Do you mean to say that the cross piece would not come out to the side of the load?

A. He says that if they lay them directly across. He says it all depends on how they lay the cross pieces.

Q. How do they usually lay the cross pieces?

A. He says they sometimes lay them straight over, and sometimes they lay them this way (indicating).

Q. Ask him how do they usually lay them.

MR. PLUMMER: We submit that he has answered that, if Your Honor please.

THE COURT: No. He may answer.

A. He says that is the only way he has seen them; sometimes they come right straight across, he says, and sometimes this way.

THE COURT: Which way is the more often?

A. He says he has seen both of them, and he don't know which one there is the most of.

MR. NELSON: Q. What good would it do to put in a cross piece if it didn't come to the side of the load?

MR. PLUMMER: We object to that as argumentative.

THE COURT: Overruled. This is cross examination.

A. He says it don't have to stick outside of the load to do any good.

MR. NELSON: Q. Do they usually come to the side of the load?

A. Yes.

Q. Did you ever work on a transfer shed or transfer platform before you began working for the Rutledge Timber Company?

A. No.

Q. Do you remember Mr. Hugh Kennedy, and Mr. Bert Kennedy and myself talking to you one day last week about this case?

A. He says you inquired some few words about it.

Q. Ask him if Mr. Cromblath was also there.

A. Yes.

Q. Ask him if he did not at that time and place, and in the presence of these men whose names I have mentioned, tell Mr. Kennedy and myself that he did not see where Sundin was just prior to the accident?

A. He says he never said it.

Q. Ask him if he did not at that time and place, and in the presence of the men whom I named, say

that he did not see where Sundin took hold of that car of lumber?

A. No.

Q. Ask him if Sundin could not have turned his face around and looked at the side of that car of lumber and have seen whether or not there were cross pieces in the load?

MR. PLUMMER: We object to that as calling for the conclusion of the witness.

THE COURT: Yes, I think the jury is just as competent to answer that question as he is.

MR. NELSON: Only he has worked around these cars all the time.

THE COURT: But isn't it obvious that the deceased could have seen it if he had turned around to look at it?

MR. NELSON: Well, if it is obvious, that is—

MR. PLUMMER: We admit that.

MR. NELSON: Q. Wherever these cross pieces were in the load there was an opening between the boards, was there not?

THE COURT: That must necessarily follow.

MR. NELSON: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. How thick were these boards that were usually used for cross pieces on these loads?

A. He says they use lath.

Q. Lath?

A. Yes.

Q. How wide was this car, the car itself, that the

lumber was piled on at the end, where the men had to take hold of it?

A. About forty-three inches, he says he thinks.

MR. PLUMMER: I think that is all.

RE-CROSS EXAMINATION by

MR. NELSON:

Q. When this car was taken back from the transfer car, when the car on which you were pushing was taken back from the transfer car, how far back from the transfer car did you take it before you again took a start towards the transfer car?

A. About two or three feet.

Q. About two or three feet?

A. Yes.

Q. Did you take it back two or three feet each time?

A. About, he says.

Q. Did you watch Sundin at all of the times that you were moving it back and forth?

A. He says that he looked at the side of the load sometimes and he seen him when he was on the side of the load, and then when he come up on the transfer track.

Q. What is that?

A. He says he seen them when they come up on the transfer track, and every time they changed and pulled the load back and started to shove it again he could see what position he had.

Q. When they got up on the transfer track?

A. Yes, and when they were pushing the load back and took a change he could see.

Q. What position was he in when they pulled the load back?

A. He says, then we turned and had our faces against the load.

Q. Could those men by pulling that load in that manner pull it back?

A. Yes.

MR. NELSON: That is all.

MR. PLUMMER: That is all.

THE COURT: Gentlemen of the jury, I am going to excuse you until nine o'clock Monday morning, and in the meantime you will be very careful to keep yourselves aloof from outside influences. There may be a number of people in this city who are more or less interested in this matter in one way or another, connected either with the interests of the plaintiffs or with the interests of the defendants. Be unusually careful to avoid coming into contact with these influences, in view of the fact that a day will elapse before we can take up the trial again. Return Monday morning at nine-thirty.

An adjournment was thereupon taken until 9:30 A. M. Monday, June 4, 1917.

9:30 A. M., Monday, June 4, 1917.

MR. PLUMMER: I will recall Mr. Brewsted for a few questions.

HARRY BREWSTED, heretofore duly sworn in behalf of plaintiffs, upon being recalled, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Brewsted, I will show you a photograph, and ask you to state whether or not that appears to be a substantially correct description of the short tracks and the lumber shed that has been referred to in your testimony?

A. He says if he understands the picture.

Q. I am asking him if that picture appears to describe or show these short tracks?

A. Yes.

MR. PLUMMER: I will offer this in evidence then.

MR. NELSON: For the purpose of showing those tracks, we have no objection to it, but there are other things that are entirely different now than at that time, but for that purpose only we do not object.

MR. PLUMMER: In asking him other questions I have got to refer to this car here. Of course that isn't the same kind of a car that was used at that time. I will have to have him explain that difference. We don't claim that it is the same kind of a car.

Said photograph was thereupon marked PLAINTIFFS' EXHIBIT NO. 1.

Q. In this photograph, Plaintiffs' Exhibit No. 1, there is a car on a track running at right angles with the short tracks that you have described. State what sort of a car was used on that transfer track upon which you and your gang were trying to put this load of lumber. Show the difference between this one and the one that was actually used.

MR. NELSON: We object to that as incompetent, irrelevant, and immaterial, if the Court please.

THE COURT: Sustained. You admit that this isn't the kind of a car that was used.

MR. PLUMMER: Q. What sort of a car was used on the transfer track, being the track running at right angles with these short tracks? Describe that car.

MR. NELSON: We object to that as incompetent. No complaint was made against that car, and it is wholly immaterial.

THE COURT: Oh, no. It is just to get before the jury the general situation. He may answer the question. Is there any question about what kind of a car it was?

MR. PLUMMER: I don't know. I want to have the jury have the full situation before them.

THE COURT: Well, he has given the width of the car used that day.

MR. PLUMMER: No, Your Honor.

THE COURT: You mean the large car?

MR. PLUMMER: Yes.

THE COURT: Very well. I thought you were referring to the car they were pushing out.

MR. PLUMMER: No. The car they pushed out they pushed onto this car.

Q. Just describe this car I referred to, running at right angles—this transfer car, what kind of a car was that?

MR. NELSON: We object to that as wholly immaterial.

THE COURT: Overruled.

A. He says it was one made out of wood.

Q. Was it a flat car or a box car?

A. A flat car, with two tracks on it.

Q. What were the two tracks used for?

A. So that they could take one or two cars, as they seen suitable.

Q. Referring to the ends of these short tracks upon which the car was going that you and your gang was pushing on the day that Mr. Sundin was killed,—I am referring now to the ends of these short tracks—how were the ends of those rails kept with reference to the rails on the flat car that you have described, ordinarily kept?

MR. NELSON: If Your Honor please, we object to that as irrelevant, incompetent, and immaterial, and not within the issues in this case.

THE COURT: Sustained.

MR. PLUMMER: Does Your Honor hold that we can't show the condition of the tracks? I will state, if Your Honor please, that in offering that we are charging the defendant here with negligence in maintaining a track in a defective condition. The mere showing of the existence of a condition isn't showing negligence unless you show that it is an abnormal condition or a condition that doesn't ordinarily exist or that is not in an ordinary form. We want to show how it was usually kept, whether on a level or otherwise, and then show the condition this particular track was in at the time the accident happened, which

makes the connection, showing negligence. It is absolutely essential, it seems to me.

THE COURT: The only difficulty about that is that you haven't alleged what the usual manner was, and you have alleged that the deceased knew of this condition.

MR. PLUMMER: I am afraid the court is probably confounding assumption of risk is one proposition, and negligence of the master is another. First we have got to show the negligence of the master.

THE COURT: Yes, but have you alleged anything about the other tracks?

MR. PLUMMER: I have alleged that they negligently permitted them to sink down lower than was safe.

THE COURT: Then why is it material to know how the other tracks were?

MR. PLUMMER: For the purpose of comparison.

THE COURT: The objection is sustained.

MR. PLUMMER: Plaintiffs offer to show by this witness that all of the other tracks which run parallel to the track upon which the car was running that caused the injury to the deceased were ordinarily and usually kept and maintained on a level with the cross tracks on the transfer car, upon which transfer car the deceased and his co-employees were attempting to place the loaded car of lumber, and that on that particular track that this car of lumber was being shoved over, the ends thereof were allowed by the defendant to get in a condition—

THE COURT: That is another question.

MR. PLUMMER: All right then. Just the first part is what I will offer. For the purpose of showing, or at least showing circumstances tending to prove negligence on the part of the defendant in maintaining and permitting the track to be in the condition it was in at the time he was injured.

THE COURT: The offer is denied, for the reason that there is no averment in the complaint charging that the other tracks were kept in any particular condition, or that the deceased knew of any such condition.

MR. PLUMMER: Q. On the day of the injury and immediately after the accident to the deceased, state whether or not you saw the track under the car at the point where the accident occurred?

MR. NELSON: If Your Honor please, we object to that for the same reason, the same objection that was made Saturday, and the objections were sustained at that time,—incompetent and immaterial.

THE COURT: This is objectionable because it is repetition. He testified that the track was considerably lower immediately afterwards than it was the night before.

MR. PLUMMER: I wasn't sure that I had covered that, if Your Honor please.

THE COURT: Yes.

MR. PLUMMER: How much lower was the track on Monday, right after the accident, that is, the ends of the rails, of this short track, how much lower was

that, if any, than the rails on the car which run at right angles with the car you were shoving?

MR. NELSON: We object to that as repetition.

THE COURT: I think it is. I think he gave the precise distance, but I am not sure. He may answer now.

A. Close to one and a half inches.

MR. PLUMMER: There are one or two little questions that I don't think I covered. I am not positive. I don't think I did.

Q. Before you and Knudson and Hegstrom started the car, while the car was yet standing still, before you started it, what was on the cars on the tracks on the side of this particular one you were shoving?

A. There was lumber loaded on them.

Q. What part of the load fell off that killed Sundin?

A. The part at the right side.

Q. State whether or not any of the left side fell off?

MR. NELSON: We object to that as immaterial.

THE COURT: Overruled.

A. No, he says.

MR. PLUMMER: I would like to show, if Your Honor please,—I don't know whether or not the pleadings are specific on that—just the general manner of carrying on that work. It might appear at first to be immaterial, but I want to show just how much the deceased was around there when the loading of these cars were carried on.

Q. When did you and your gang take a car out,—when would you take a car out, a car of lumber, out to this transfer car?

A. When they had time and when the loads were high.

Q. What would you be doing before you would take a load out, you and your gang, including Sundin, I mean, before you would take out any particular load, for instance, this load, before you would take this load out, what would you and the gang be doing before that time?

A. He says they would go out in the yard with some loads and come back after some more.

Q. How far did you have to take these loads out into the yard away from where they were loading on the cars that were standing still?

A. He says that all depends on where they went.

Q. I just want to get the general distance, is all, to get some idea about it, is all.

A. He says he can't tell.

Q. How long would you and your gang usually be gone away from where the men were loading on to these cars down at the mill, when you were taking the cars down?

A. He says it all depends on how it went. He said it could take a longer and a less time.

Q. Well, give some idea about how long it was, if he can. I don't know anything about it.

A. Well, he says it all depends on whether they went to the first alley or out to the last alley.

Q. How long would it be if they went to the first alley?

A. About five minutes.

Q. How long would it be if he went to the last alley?

A. Ten or twelve minutes. It all depends on how many loads they have.

Q. You were asked a question by Mr. Nelson as to whether or not you were boarding with Mrs. Sundin. State whether or not there are other men boarding there with you, Mr. Brewsted?

A. Yes.

Q. How many?

A. Six.

MR. PLUMMER: That is all.

CROSS EXAMINATION by

MR. NELSON:

Q. You are quite friendly to Mrs. Sundin, are you not, Harry?

INTERPRETER: I don't know how to state that.

Q. Ask him if he and Mrs. Sundin are not very good friends.

A. Not any more than any other friends.

Q. Ask him if he doesn't drive around with her a great deal in her auto.

MR. PLUMMER: I think I shall object to that under the circumstances here, if Your Honor please.

A. No.

MR. NELSON: This car that you were pushing out at the time of the accident was on the second track from the end of the chain shed, was it not?

A. The second load, he says.

Q. This accident happened between ten and eleven o'clock, did it not?

A. Nine and ten.

Q. Between nine and ten?

A. Yes.

Q. That morning from seven o'clock until the time of the accident happened you had been working on the transfer platform, had you not?

A. Yes.

Q. Just before the accident had not you and Knudson and Sundin and Mr. Moe taken out a load from the north side of the transfer platform out to the yard and had returned from taking that load out?

A. Yes.

Q. When you were returning from taking that load out, and when you were right at the little office at the west end of the transfer platform, do you remember Mr. Moe saying, "We will take that load out next," and pointed over to this load which you were moving at the time of the accident?

A. He says that Moe told him to go over on this other side after they had been out in the yard.

Q. Do you not remember, when you were right at the little office on the west end of the transfer platform, and were going along with Mr. Moe and Mr. Knudson and Mr. Sundin, that Mr. Kennedy called Mr. Moe into the office just prior to the accident?

A. He says when he was going over he met Moe on the platform.

Q. Ask him if he remembers Mr. Kennedy calling Mr. Moe into the office.

A. He says he met him, but he says where he went he don't know.

Q. He met Mr. Moe?

A. Moe, he says.

Q. How high was this load on the first track at the time you moved the load on the second tracks?

A. He says he can't say just how high it was.

Q. What is your best remembrance as to how high the load was?

A. He says he never paid no attention to it, so he can't say.

Q. If it had been as high or nearly as high as the second load you would have taken it first, would you not?

MR. PLUMMER: We object to this as wholly immaterial, and, second, it isn't cross examination, and calls for his conclusion as to what he would do. What he would do about some other load is wholly immaterial.

THE COURT: I don't quite understand your question, Mr. Nelson.

MR. NELSON: If Your Honor please, they have attempted to prove that on account of this load being at the side of it, Sundin couldn't have seen the second load, as to whether or not there were cross pieces on it. My purpose is to show that if this load was anyway as high as the second load they would have taken this first one out first, and if it was not as high he could have seen whether or not there were any cross pieces in it. I think it is entirely in the cross examination, to show the height, and that is one of

the things that would show the height, as to when they would take it out.

MR. PLUMMER: The evidence shows that he did take it out on orders from Moe, and he can't tell what would be in Moe's mind as to when this should be taken out.

THE COURT: Ask him first the direct question as to whether this was as high as the second load.

MR. NELSON: Q. Was the load on the first track as high as the load on the second track? How high was it, about?

A. He says he can't say exactly. He says he never paid no attention to it.

Q. What kind of lumber was it,—dimension lumber or six inch lumber?

A. He says he don't know exactly, but he thought it was two inch.

Q. He thought it was two inch. How wide?

A. He says he aint sure, but he thinks it was two by twelve.

Q. Two by twelve?

A. Yes.

Q. How long?

A. Fourteen feet.

Q. Fourteen feet?

A. Yes.

Q. I would like to get a direct answer to my question, which I haven't been able to get, and I want to repeat it. When you and Knudson and Sundin were coming from the north across the end of the transfer

platform, did not Moe say, "We will take out that load next," and point to this one?

A. He just told them to go over on this side.

Q. And didn't tell them what load to take out?

A. No.

Q. Do you remember when this picture was taken by Mr. Black and the photographer?

A. He says that there have been so many that took pictures out there that he didn't know.

Q. Ask him if he remembers Mr. Black being down there.

A. He says he seen him once, but he didn't see him take any pictures.

Q. Does he know how many pictures he took?

A. No, he says he didn't look at how many he took.

MR. BLACK: If the court please, I object to this imputing that I was there at all and took this picture. I wasn't there and took this picture, and it might leave an inference, if it was left this way, that I was. I wasn't there and took any picture.

MR. NELSON: I was informed by one of the men that it was Mr. Black, he thought, and that was the reason I asked the question.

MR. BLACK: No, I went out one day when it was snowing hard, and I didn't take the picture, and then I sent a photographer out to take this picture.

THE COURT: Then you were guilty of the attempt.

MR. BLACK: I didn't know that it was any offense, if Your Honor please.

THE COURT: I can't see that there would be anything wrong in going out and taking a picture. It would be perfectly proper for Mr. Black to go out and take a picture, if he knew how.

MR. NELSON: It certainly would.

THE COURT: Has he testified as to how long the deceased had been working at this particular employment before he was killed?

MR. PLUMMER: I am not sure. I will ask him, to be sure.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. How long had Mr. Sundin been working at this same kind of work before he was killed?

A. He says he started the 3rd of April, and he started at night.

Q. The same time?

A. He says he didn't think the night shift started right away.

Q. About how long does he know that Sundin was working there before he was killed? About how long does he know that?

A. He says he can't say exactly, because he comes at night. He says Moe will know.

MR. NELSON: If Your Honor please, Mr. Moe has already testified that he went to work April 3rd.

THE COURT: All right then. I just wanted to be sure.

MR. PLUMMER: That is all.

MR. NELSON: That is all.

OLAF HEGSTROM, produced as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. State your name.

A. Olaf Hegstrom.

Q. Where do you live?

A. At Deer Park, Washington.

Q. Did you at any time work for the Edward Rutledge Timber Company here close to the city?

A. Yes, sir.

Q. State whether or not you worked there at the same time Sundin worked there?

A. Yes, sir, I did.

Q. What kind of work were you and Sundin doing during the time he worked there and the time you worked there?

A. That morning?

Q. That, and before that time, during the time Sundin worked there.

A. I was working out in the yard.

Q. What kind of work were you doing in the yard?

A. I was taking out the lumber, stripping out some lumber.

Q. What work were you doing on the morning that Sundin got hurt, what were you and Brewsted and Knudson doing that morning?

A. I don't quite remember.

Q. Well, do you remember Mr. Sundin getting hurt?

A. Yes.

Q. Just go ahead and tell the court and jury just how it happened, in your own way, just go ahead and tell how he got hurt, just the same as though you were—

A. We was taking out a load on the south side, and I and Brewsted and Mr. Knudson was pushing behind the load, and when we pushed, it stopped when we got to the transfer platform, and then we took it back and tried it again.

Q. Tried what?

A. Tried to get it on again, and we maybe tried it two or three times,—I don't quite remember,—and then the last time we tried it it went right over and the lumber tipped over.

Q. Why did you have to try it the number of times that you did, to get it up on this car?

A. Because we didn't get it up there the first time.

Q. Why couldn't you?

MR. NELSON: If Your Honor please, we object to that.

A. It stopped against the track, the end of the track.

MR. PLUMMER: Q. When you say you was trying to get it up on the transfer track, state whether or not you refer to your car, upon which was two tracks, when you say you wanted to get it up on the transfer platform, is that what you mean?

A. Yes.

Q. When this load went off what did you do about putting the load back on again, or doing something with the lumber, after the lumber had fallen off, or part of it, what did you do then with the lumber?

A. I put some of the lumber on an empty car standing on another track, and some of it I put back on the load.

Q. State whether or not there were any strips or cross pieces or binders on this load at all.

A. No, sir.

Q. The strips that are ordinarily used there, cross strips that I speak of, what was the size of those that they usually used there?

A. It was lath.

Q. Lath?

A. Yes.

Q. And how were they usually placed between the boards, that is, what—

MR. NELSON: If Your Honor please, we object to this. There is no allegation of negligence as to how they placed them, or what kind of cross pieces they used. It is admitted that we usually used them.

THE COURT: No, but this is bearing upon the question, I suppose, as to whether or not they were easily observable.

MR. PLUMMER: Yes, that is our point.

MR. NELSON: All right.

MR. PLUMMER: Q. Say there are boards put down there, and you want to put a cross piece on, how are they usually put on?

A. Sometimes I seen them that way, straight across.

Q. That is at right angles?

A. Yes.

Q. All right.

A. And lots of times I see them that way (indicating).

Q. On an angle?

A. Yes.

Q. All right. And when they were on an angle, as you have described here, like that, state how far they would extend through the load, if at all?

A. How do you mean?

Q. Well, I want to find out, when they are put in this way, I want to know whether or not they would extend out to either side.

A. Well, not always.

Q. Before you started this load, you and the other four men,—you three men started it first, you and the other two men, before you started on the load, when it stood still, after it had been loaded up, what was on either side of it, on the other tracks, if anything?

A. There was loads of lumber.

Q. When you tried to get your car of lumber up to this transfer car that you have described, three times trying to get it up there, state whether or not the other end of that same load had come out and away from these side loads that was there on either side of your car before it started?

A. No, sir.

Q. It hadn't?

A. No.

Q. How far did it extend back there?

A. I couldn't tell.

Q. Well, about how far?

A. Well, I never looked; I don't remember.

Q. Did you look at the track after the accident occurred at any time, where the accident did occur, where you say it bumped against the track as you tried to put it up on the transfer car?

A. No, sir.

Q. Did you look at the tracks after that at all?

A. No, sir.

Q. At any time?

A. No, sir.

Q. You never did?

A. No, sir.

Q. When these cars were taken out into the yard what was done with the lumber there?

A. It was piled up.

Q. In big stacks?

A. Yes, sir.

Q. Like an ordinary lumber yard, I presume?

A. Yes, sir.

Q. What did you have to do with that?

A. I piled it up after they started the pile.

Q. In handling that lumber could you tell about how many pieces was usually put in between these loads when they were loaded on the cars?

A. It all depends on the kind of lumber.

Q. How many were usually put in these loads that fell—of the size that fell on Mr. Sundin?

A. Maybe two, maybe four, or maybe five or six.

Q. What would determine the difference, as to number, just describe that, will you?

THE COURT: Why do you have more sometimes than others?

A. Because this narrow lumber is very easy to fall over.

MR. PLUMMER: Q. And what are the widths of the lumber, what are the usual widths? What do you mean by narrow lumber and wide lumber?

A. One by six is narrower than one by twelve, and easier to tip over.

Q. But there is some lumber that you have there that is twelve inches wide?

A. Yes, lots of that.

Q. Any wider than that?

A. I don't remember.

Q. What was the width of the lumber that fell over on Sundin?

A. One by six.

MR. PLUMMER: Take the witness.

CROSS EXAMINATION by

MR. NELSON:

Q. Usually in a one by six load they had about six pieces, did they?

A. Maybe three, maybe four, and maybe five or six.

Q. And that morning when you pushed this load

out and it stopped, how far did you take it back before you started with it again?

A. I don't remember.

Q. About how far? Just your best judgment.

A. Maybe two or three feet.

Q. Two or three feet?

A. Yes.

Q. You couldn't get very much of a start with a load as heavy as that in two or three feet, could you?

A. Yes, we could get a little start.

Q. Are you sure that you didn't take it back more than two or three feet?

A. Well, maybe we did; I wouldn't say for sure.

Q. Mr. Hegstrom, did you regularly work on the transfer gang?

A. No, sir.

Q. You were just helping out with that load?

A. Yes, sir.

MR. NELSON: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Who told you to help with this load?

A. Mr. Moe.

Q. You said there was three men, including yourself, on the end of the car when you started?

A. Yes, sir.

Q. State whether or not there was any room there for any more.

MR. NELSON: We object to that as calling for a conclusion.

THE COURT: Overruled.

MR. NELSON: We except.

MR. PLUMMER: Q. Was there any room there for any more to push that car at the end?

A. No, sir.

Q. How wide are the tracks, that is, between the rails, how wide are the little tracks?

A. I don't know how wide.

Q. Just measure with your hands as near as you can estimate it. I don't know either.

A. Maybe that wide (indicating).

Q. How wide was the load of lumber?

A. About thirty-six inches.

Q. Don't you know, as a matter of fact, Mr. Hegstrom, that often four men do get back of those loads and shove on them?

A. No, sir.

Q. How many loads have you helped shove out?

A. Well, I don't know.

Q. About how many?

A. Well, I couldn't tell, because I don't remember.

Q. About how many days did you help shove out loads?

A. I wasn't there any whole days.

Q. You weren't there any whole days?

A. No, sir.

MR. PLUMMER: That is all.

MR. NELSON: That is all.

OLGA SUNDIN, called as a witness in behalf of plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. Your name is Mrs. Sundin?

A. Yes, Mrs. Olga Sundin.

Q. You are the plaintiff in this action?

THE COURT: That is conceded, I suppose.

MR. PLUMMER: I guess it is.

Q. How old was Mr. Sundin at the time of his death?

A. Thirty-nine years.

Q. What was the condition of his health at all times before he died?

A. He was in good health.

Q. What was his custom with reference to being employed, whether or not he was employed at different times or all the time? I want to get his general employment. Do you understand that?

A. No.

MR. PLUMMER: I don't like to lead the witness, but at the same time I don't see how I can make her understand in any other way.

Q. How much of the time did he work?

A. All the time.

Q. How long were you married?

A. Sixteen years.

MR. PLUMMER: I believe the children are conceded to be the children of these parents?

MR. NELSON: Oh, yes. We will concede all those facts.

MR. PLUMMER: Q. Just tell the ages of the children.

A. Twelve years.

Q. The oldest?

A. Margaret.

Q. Margaret is twelve?

A. Yes.

Q. What is the next one?

A. Nine.

Q. Iver is nine years old?

A. Yes, sir.

Q. And Eugene?

A. Nine months.

Q. Eugene was born after Mr. Sundin died?

A. Yes.

Q. What was Mr. Sundin earning at the time he was hurt, how much a day?

A. \$2.75.

Q. What had been his business before he worked down here at this job?

A. Lumber grader.

Q. Lumber grader?

A. Yes.

Q. How long had he worked at the business of lumber grader before he was killed?

A. Five years.

Q. Do you know what the wages of a lumber grader are?

MR. NELSON: We object to that as incompetent, irrelevant, and immaterial, unless qualified.

MR. PLUMMER: Well, at the time he was killed, I presume.

MR. NELSON: Where?

MR. PLUMMER: Here, of course.

MR. NELSON: He wasn't working as a lumber grader here.

MR. PLUMMER: I know, but I thought maybe she might know. All right. I will withdraw that.

Q. What were his habits? Did he have any bad habits?

A. No.

Q. Did he drink?

A. No.

Q. How did he act towards the children?

A. Good. He raised them good, and tell them not to steal or lie, and was very good.

Q. Did he show any interest in training the children, to bring them up as good citizens?

A. Yes.

Q. Now during the time that you and he were married did you accumulate any property?

A. Yes.

Q. What property did you accumulate from his wages?

A. We got a home.

Q. How much is that worth, about?

A. About a thousand dollars.

Q. What other property did he accumulate from his wages?

A. We got a lot in Deer River that he bought.

Q. How much did you pay for that?

A. Two hundred dollars.

Q. And what other property did he accumulate?

A. Bought a lot in Duluth but had to quit it after he was killed.

Q. How much had you paid on that before he died?

MR. NELSON: We object to that.

THE COURT: Overruled.

MR. PLUMMER: How much did he pay on that lot?

A. We paid about \$150. We should have paid \$800, but—

Q. I suppose that he bought household furniture and equipment for your house, besides that, did he?

A. Yes.

Q. Did he buy anything else for you?

A. Yes, he bought an automobile.

Q. This Ford machine you have here?

A. Yes.

MR. PLUMMER: I guess you may take the witness.

CROSS EXAMINATION by

MR. NELSON:

Q. When you say he worked all the time, you mean he worked all the time there was work?

A. Yes; there was times he was laid off.

Q. He was a good, steady workman, you mean?

A. Yes, you bet.

Q. But at times the mill would shut down, would it not, both here and other places?

A. Then he worked on the river other places.

Q. Did he always work all the year round when he was a lumber man?

A. Yes. When the mill don't run here, he was home then.

MR. NELSON: That is all.

MR. PLUMMER: That is all, Mrs. Sundin. Do you want to recall Mr. Moe?

MR. NELSON: Yes.

MR. PLUMMER: Mr. Moe, will you take the stand.

ANDREW MOE, heretofore duly sworn on behalf of plaintiffs, upon being recalled, testified as follows:

CROSS EXAMINATION by

MR. NELSON:

Q. I understood you in answer to Judge Dietrich's question, to state that there were no rules down there about working around these loads. I will ask you whether or not it is a fact that you often warned the men working there under you to keep away from the sides of the loads?

A. Yes, sir.

MR. PLUMMER: I object to that unless it is shown that he warned Sundin, or that Sundin was warned.

MR. NELSON: Q. Is it not a fact, Mr. Moe, that on several occasions you warned the deceased, Axel Sundin, to keep away from the side of the load?

A. I warned them all, I believe numbers of times.

Q. As I understand it, Sundin worked the night shift the Saturday before, and part of the Sunday morning before the accident?

A. I don't remember that.

Q. If he worked on the night shift the week be-

fore, he would have worked Saturday night and Sunday morning, would he not?

A. Yes.

Q. And then there would have been no work on this platform until Monday morning, when the day shifts went on again? There was no work there on Sunday?

A. No, sir.

Q. You stated on your direct examination, as I remember it, that you and Knudson and Sundin and Brewsted had taken the loads away from the north side of the transfer shed that morning, and were starting to take out the loads on the south side just before this accident?

A. Yes, sir.

Q. Do you remember as you were going across the west end of this platform, that you said to Sundin and Knudson and Brewsted, "we will take out that load next," and pointed to this load that afterwards part of it fell?

MR. WERNETTE: I object to that, if Your Honor please, as not proper cross examination.

MR. NELSON: If Your Honor please, he stated on direct examination what they had done just previous to the accident, and Mr. Plummer has spoken here about what directions were given these men as to what loads to take out.

MR. PLUMMER: You denied that, though.

MR. WERNETTE: If it is for the purpose of impeachment it wouldn't be a proper question at the present time.

THE COURT: He didn't go into the particular subject as to just what occurred there. As I remember it, this witness was asked to state just what did occur there, and of course that would open the door for cross examination on the whole subject. I think I shall let him answer.

(Question read.)

A. Yes, I did.

Q. Then you could see that load from the west end of the platform at that time?

A. Yes, sir, we could see it.

Q. It was all out in the daylight, all of this work?

A. Yes.

Q. No roof over where they were working or anything?

A. No, not where they were working, no.

Q. I will ask you if it is not a fact, Mr. Moe, that there are ten tracks west of the west end of the chain shed, out here?

A. Yes, sir.

Q. And out at the end, at this west end of this platform, there is a little office is there not?

A. Yes, sir.

Q. Usually when they are loading these cars from the chain, they load lengths of lumber, or lumber of the same lengths, together, do they not? That is, if they load a car of sixteen foot, six inch stuff, they usually load a car of sixteen foot stuff next to it, or close to it? They usually load the same lengths together?

A. We usually do, but sometimes we can't.

Q. Now, Mr. Moe, those cars or trucks are eight feet long, are they not?

A. I have never measured one, but I should judge about that.

Q. And they are two feet from the rails to the top of these cross beams?

A. I never measured them either, but I should judge they are about that.

Q. That truck you see in this picture, on this side of the first load, on the south side, fairly represents the trucks that were used down there?

A. Yes, sir.

Q. Mr. Moe, in twelve inch timbers, two and three inches wide, I will ask you whether or not cross pieces are used in that kind of a load as much as in the inch stuff, six inches wide?

A. Very seldom use cross pieces in twelve inch boards.

Q. That is the general practice in all lumber yards?

A. Wherever I have seen it.

Q. And you have worked in a number of them have you not?

A. Well, not so very many, but for a good many years.

MR. NELSON: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Moe, counsel asked you about warning the men, and you answered that you warned all of them.

Now in warning them what did you say, what was your expression that you used?

A. Oh, if I see a load that I thought wasn't quite safe, I said, "Boys, keep away from that side," whichever side I might think was unsafe. I done that lots of times.

Q. And that is what you meant when you answered his question?

A. That is what I meant.

Q. Do you recall at any time having warned Sundin himself?

A. I don't know if I exactly warned him individually, but there were always three together, and I would talk so that they would all hear.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. NELSON:

Q. Mr. Moe, isn't it the custom in all yards that you know of in this vicinity for the men who are handling these trucks themselves to observe as to whether or not there are cross pieces in a load, or whether or not the load is solid on the truck?

MR. PLUMMER: We object to that as simply calling for his conclusion, if Your Honor please, and second, it isn't cross examination. He is trying to prove his assumption of risk by our witness. We haven't asked him anything about—

THE COURT: Sustained.

MR. NELSON: That is all.

MR. PLUMMER: We rest.

THE COURT: I want to ask the witness a question. You spoke of warning these men from time to

time as you saw that a load didn't seem to be quite safe. Is that more or less of a common thing, that a load wouldn't be quite safe?

A. Yes, sir, so far as I have seen in the lumber yards, it is a common thing that there are some loads that are not safe.

THE COURT: Why wouldn't they be safe? I mean what would be the reason for the peril? Can you give us an illustration?

A. Well, sometimes the chainers don't pay close enough attention to loading it straight and nice, and sometimes there will be a ruck a little bit for a few minutes, and they wouldn't place them exactly the way they should, and lots of reasons, and once in a while there will be a load that isn't safe.

THE COURT: That is all.

RE-CROSS EXAMINATION by
MR. NELSON:

Q. Is it not a fact that always above the last cross piece there are a number of pieces that are not held by anything?

A. There should be, but sometimes there will be only a few boards sometimes; if the transfer men think the load is big enough they will take it out, even though the cross pieces are right on the top.

Q. But usually there are a number of tiers above the last cross pieces?

A. There should be, and usually is.

Q. Is it not a fact that a board may fall off, no matter how well a load may be loaded?

MR. PLUMMER: We object to that as immaterial, and not cross examination.

THE COURT: Sustained. Well, read that answer.

(Last answer read.)

THE COURT: The objection is overruled.

A. Yes, and it might fall off, no matter how they were loaded, I have seen that.

Q. And a tier of a load or the top of two tiers or three tiers might slide off of a load?

A. I have seen that too.

Q. That is a thing that may happen in any yard, is it not?

A. Yes, it might happen in one yard as well as another.

Q. And that is one of the things that the men of experience moving trucks guard against, is it not?

MR. PLUMMER: That is objected to as not cross examination, if Your Honor please.

THE COURT: Sustained. I think perhaps it is cross examination, but I think it is a conclusion that the jury can draw just as well as this witness.

MR. NELSON: I think it is, in a way, except that I think it is a fact that could be proven by a man of experience. He has proven himself to be an expert, if Your Honor please, and I think it is up to us to be allowed to prove that that is one of the risks he is assuming.

MR. PLUMMER: That is their defense.

MR. NELSON: But we can prove it by their witness if they put him on.

MR. PLUMMER: We just asked him what occurred there.

THE COURT: You did ask him about the cross pieces.

MR. PLUMMER: Yes, that is right.

THE COURT: What they were for.

MR. PLUMMER: Yes.

THE COURT: I think this is germane so far as cross examination is concerned. I think it is proper cross examination. I think I shall overrule the objection.

(Question read.)

A. Yes, it is the same as any other kind of work; it don't make any difference what it is; they have got to look for something.

MR. NELSON: That is all.

RE-DIRECT EXAMINATION by

MR. PLUMMER:

Q. Mr. Moe, counsel asked you if sometimes lumber didn't fall off from these cars. Now in moving this car of lumber, of the kind that was being moved when Sundin was hurt, and the distance it was being moved before it came to this end of the track that we claim was out of repair, before it came to that, and being shoved along as has been described here, what would cause the lumber to fall off, going that distance, under those circumstances?

A. I couldn't tell.

Q. Do you know of anything?

A. No.

MR. PLUMMER: That is all.

RE-CROSS EXAMINATION by

MR. NELSON:

Q. But it will sometimes do it, wont it, Mr. Moe?

A. Certainly it will.

MR. NELSON: That is all.

THE COURT: Anything further with this witness?

MR. PLUMMER: That is all. We rest.

(Mr. Nelson thereupon made a statement to the jury.)

JOE FREITAG, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. NELSON:

Q. State your name?

A. Joe Freitag.

Q. Where do you live?

A. 1601 Front.

Q. You work for the Edward Rutledge Timber Company, do you?

A. About one year, yes.

Q. You knew Axel Sundin in his lifetime, did you?

A. I know him.

Q. Did you ever work with him?

A. I worked before in the Rutledge Lumber Company about three weeks on the night shift, before.

Q. Did you work with Mr. Sundin in shoving out

these cars of lumber away from the transfer chain?

A. Yes.

Q. I will ask you whether or not you and he ever had any conversation as to the danger of getting alongside of a load of lumber?

A. Yes.

Q. What did he say to you in that regard?

A. It was in the morning, the first time, on the day shift. I worked with him on the day shift, and we were taking the car out, the first truck, just the first time. I will show you. I go to the side here and push it out, the truck, and Mr. Sundin—from the chain—

Q. Just tell what he said to you.

A. He worked there, and he said, "Joe, come back; on the side is too dangerous."

Q. You were at the side of the truck of lumber, were you?

A. I stand there.

Q. You were partly at the side of the truck?

A. Yes.

Q. And Mr. Sundin said, "Joe, get away; it is too dangerous?"

A. Go back—

MR. PLUMMER: We object to that as leading.

THE COURT: He said, "Joe, go back; it is dangerous?"

MR. NELSON: Q. He said, "Joe, go back; it is dangerous?"

A. Yes.

Q. State whether or not, shortly after that, any other person in Mr. Sundin's presence warned you about the danger of working alongside of a truck of lumber? Answer that yes or no.

A. A short while after come Mr. Moe, after the warning come Mr. Moe out there and Moe crossed to me, and he said, he tell me, "Freitag, don't push the truck from the side; it is too dangerous." He give me that advice.

THE COURT: Was this in the presence of—

MR. NELSON: Q. Sundin was there, was he not?

A. Yes.

MR. PLUMMER: We object to that as leading.

MR. NELSON: If Your Honor please, I based my question, in the presence of Sundin.

THE COURT: Was Mr. Sundin there when Mr. Moe said that or not?

A. Yes. Mr. Sundin, first, he warned me.

THE COURT: Yes, but when Mr. Moe said that to you where was Mr. Sundin?

A. Behind this truck.

MR. NELSON: Q. State how many men, Joe, you have worked with behind one of those trucks of lumber.

A. Four men.

Q. Did four men get back of the truck and push?

A. Yes.

MR. NELSON: That is all.

CROSS EXAMINATION by

MR. PLUMMER:

Q. Were you one of the four men that got behind the truck and pushed?

A. Yes.

Q. How many times?

A. There is lots of difference. The same truck is very hard to push.

Q. Do you know what track this accident happened on?

A. Yes.

Q. Can you tell it by number? Has it any particular name, this track that Sundin was hurt on?

A. Not that.

Q. Did you ever push any cars on that track?

A. Oh yes.

Q. How long before Sundin was killed?

A. About two weeks.

Q. About two weeks?

A. Yes.

Q. Were you working with Sundin then?

A. Not at that time.

Q. Where was Sundin then?

A. Sundin was working in the transfer chain, and I worked day time,—I worked in the yard outside.

Q. You didn't belong to the gang though, did you?

A. No.

Q. Did you ever see four men pushing on the end of a car on this track that Sundin was killed on?

A. Mostly four men, in my time, mostly four men, the first time.

Q. How wide are you, about?

A. I don't know—two feet.

Q. And you say these other three men that was on the end of the car, were they as wide as you?

A. Oh no, they are different.

Q. About. I mean the average.

MR. NELSON: We admit that they were average men.

MR. PLUMMER: Average sized men?

MR. NELSON: Yes, average sized men.

MR. PLUMMER: That would be eight feet of men then.

MR. NELSON: Oh, no, it wouldn't be.

THE COURT: Now you have an illustration. Take one of these tables the width of a car.

WITNESS: You push the truck from the side, and not this side. Every man take it this way, and make it four men (illustrating).

MR. PLUMMER: Q. Wouldn't you have to get hold of it like this, to get it started first away from the station, brace like that (illustrating)? Isn't that the way they usually did?

A. Mostly on the side, this way (illustrating).

Q. Did you ever push on the end of a car there when Sundin was one of the four men?

A. Yes, before, yes, three weeks.

Q. Three weeks before he was killed?

A. Long before.

Q. And you say you helped push when he was one of the four men on the end of the car?

A. Sometimes three men, and sometimes four men, and sometimes five men, and sometimes six men, when it was very heavy.

Q. And sometimes eight?

A. Six.

Q. And sometimes seven, you think?

A. They don't have no chance—

Q. You say sometimes four, sometimes five, and sometimes six. Now I am asking you, do you say sometimes seven men?

A. Yes, maybe.

Q. And sometimes eight, sometimes eight men you think?

MR. NELSON: Doing what? I think, if the Court please, he is attempting to confuse the witness.

THE COURT: Doing what?

MR. PLUMMER: I am referring now to the men on the end of the car.

Q. Did you sometimes see four, five, six, and seven men on the end of the car?

A. Yes, sometimes at the end, yes.

Q. And sometimes eight?

THE COURT: If the spectators can't keep quiet they will have to go out of the room.

MR. PLUMMER: Q. Would you see sometimes eight men on the end of the car pushing also, as many as eight?

A. I don't know.

Q. Well, all that Moe ever said was, "Don't push on the side of the car when it is dangerous," didn't he?

A. He told me to.

Q. And when it was dangerous, if the load was kind of sidling, or leaned over, or something of that kind, then you wouldn't go along the side, would you?

A. Everybody knows it is not safe.

MR. PLUMMER: We move to strike that out as not responsive to the question.

THE COURT: Yes, it may be stricken.

MR. PLUMMER: Q. You understood from what Moe said to you, not to push from the side when it looked dangerous?

A. Yes.

Q. You understand by that, that if for any reason the load wasn't squared up, if it leaned to one side, it would look dangerous, wouldn't it?

A. Yes.

Q. And you understood what Moe told you, not to go along the side when it looked like that?

THE COURT: If you insist upon that question I shall have to let the other stand, because you are asking him what Mr. Moe intended by that.

MR. PLUMMER: No. I asked him what he understood from that.

THE COURT: How can he understand from that unless—

MR. PLUMMER: Well, being dangerous—

THE COURT: He said it was dangerous.

MR. PLUMMER: Moe testified that he told them

not to push on the side there when it looked dangerous.

THE COURT: But that isn't what this witness testified. He testified that the deceased, that Mr. Moe told him not to push from the side of it because it was dangerous. He didn't say why.

MR. PLUMMER: I just want to ask him what he understood as being a dangerous condition.

THE COURT: If you insist on that question I shall have to permit the other answer to go in. I am simply advising you of that.

MR. PLUMMER: I don't want to open the door and let him state a conclusion.

THE COURT: Both of them are conclusions.

MR. PLUMMER: All right.

Q. When you say that Sundin told you not to push on the side, where was Sundin then?

A. Where was he?

Q. When he told you that.

A. Close to me.

Q. And where were you?

A. Outside.

Q. Down here?

A. Oh, no, right here. I took it here from the corner and push, and he said, "Joe, go away; outside is dangerous."

Q. At that time there were other loads on either side of this load you were pushing, weren't there?

A. Just this morning, I started. He come in the morning about the first track we push it out.

Q. You mean that was the first morning you went to work?

A. No, this day the first time.

Q. When was this, how long before he was killed?

A. One week before.

Q. One week before?

A. The Thursday before, and the new week on Monday he got hurt.

Q. Now, so as to get it in the record: At the time he warned you not to push the car from where you was then pushing it, you then had hold of the near right-hand corner of the car with your left hand and the side of the car with your right, your body facing the car, and was attempting to exert strength forward in that position?

THE COURT: Yes, that is what he stated. The record may show that.

MR. PLUMMER: Q. At that time there were other tracks alongside of the track that you and he were on that morning, wasn't there?

A. No, just once.

Q. I say there were other tracks, cars, loads?

A. Yes.

Q. And there was a load on one side and also a load on the other.

A. No. This was this morning. In the morning it is open.

Q. Where did the lumber come from that you was going to shove out that morning?

A. The mill.

Q. Wasn't there any lumber going to be put on to the cars?

A. Yes.

Q. Where were the other cars the lumber was on besides the one you was moving?

A. The four tracks, from the chain over the platform to the next track.

Q. Was that the time when you was using a cable to pull them out with?

A. Yes.

Q. And the cable was run by power, wasn't it? Was that the kind of a cable that is on that car there now, Plaintiffs' Exhibit 1, that was used to haul the cars out then?

A. Yes, just here in the corner.

Q. Well, what power was used to pull those cars out that you and he was working on that morning that he gave you this warning?

A. Sometimes with the hand and sometimes with a chain.

Q. This particular car, though, I speak of, the one you had hold of like this, when he told you not to do that. What was pulling that car out?

A. A high truck with lumber.

Q. What was pulling it out? Was they using that cable then?

THE COURT: Were you pushing it or was it being pulled by a cable?

A. No. We push it out, I remember.

Q. I will show you a picture here, showing some

cars of lumber. Were those the kind of cars of lumber you were pushing?

A. Yes, on the short track.

Q. When he was telling you to be careful and come back out of the way?

A. Yes.

Q. And there were other cars of lumber like shown in this picture on each side of the one you and he was shoving, wasn't there?

THE COURT: Can't you get at it by taking a book? The witness speaks English so poorly, can't you illustrate by taking a book to illustrate the car he was pushing, and try to get at it in that way?

MR. PLUMMER: Yes, I will try and do that, Your Honor.

Q. Now here is the car of lumber that you and Sundin was pushing out when he told you to come back out of danger.

A. Yes.

Q. Now, there was a car here, wasn't there?

A. Yes, only one track.

Q. Only one track there?

A. Yes.

Q. Well, you wasn't moving it out then—

A. Just one track.

Q. Just one track?

A. Yes.

Q. That wasn't the place where he got hurt?

A. I worked with him on the short track, moving with him on the platform, and where that other party take it on the big platform.

THE COURT: Where did they take it?

A. They take it and put it out in the lumber yard.

MR. PLUMMER: Q. It wasn't this track he got killed on?

A. Oh, no.

Q. How far away from that track was the one you were working on?

A. This was on Thursday.

Q. How far away was the track that you and he was working on when he told you to come back that from the track that he got killed on?

THE COURT: Do you know where Sundin was killed?

A. No, I don't know. I wasn't there.

THE COURT: Do you know where it is?

A. Yes, I know the place.

THE COURT: How far is that place away from the place where he told you it was dangerous?

A. Just about the same place.

MR. PLUMMER: Q. You say there is only one track there.

A. I don't know. Just the same place he got hurt, Mr. Sundin. I don't know this place. It is not far, the place is not far. The place aint any bigger than this room here.

Q. You say this place where you and he were working at the time he warned you to come out of danger, there was only one track there?

A. Yes, one track, yes, sir.

Q. You are working for them yet, aren't you, the same company?

A. Yes.

Q. And have been working for them ever since?

A. Yes.

Q. What work do you do now?

A. I work in the garden; I make lawn and garden.

Q. For the company?

A. Yes.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. NELSON:

Q. Joe, where were you and Sundin when Sundin told you to keep away from the side of the car?

A. Right here, about this track here, right here.

MR. PLUMMER: Just mark that.

MR. NELSON: I mark this with a pencil, about here, was it, Joe, just about where it was?

A. The southwest side in the middle.

Q. In the middle southwest of the short tracks?

A. Yes.

Q. It was on one of the long tracks, was it?

A. No, no short track.

Q. It was on a short track?

A. Yes.

Q. You mark it, Joe. There is the south side. You mark just about where you and Sundin were when that happened.

A. Right here, in here.

Q. Make a mark there, Joe.

A. Right here. The track is a little too far.

MR. NELSON: Now, Mr. Plummer, this is where he worked, isn't it?

MR. PLUMMER: Yes.

WITNESS: About the third track on the platform, the third rail, about.

THE COURT: Now the place noted by the witness on this photograph is where you have marked X on Plaintiffs' Exhibit 1?

MR. PLUMMER: Yes, right over the spindle on the flat car.

THE COURT: All right. Go ahead.

MR. NELSON: Q. Joe, supposing that table were a truck of lumber, show how the men would push on it, if there were five or six or seven men around there helping to push it. Just get up there and show how the men would push on it.

A. It is lots different in track. Some track we get very close to the axle. Mostly we make it this way, and maybe some men, they just with their hand.

MR. NELSON: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. When Sundin told you to come away, warned you about the danger, and this track you have marked on Plaintiffs' Exhibit 1, was these other tracks there then, as shown in that picture?

A. Yes, this here; here is the short side, about here.

Q. Those other tracks was there just like that picture shows there?

A. Yes, the four tracks—

THE COURT: Just answer the question.

Q. Those tracks were there just like shown in that picture?

A. Yes, sir.

Q. And the loads were sticking out same as there?

A. Yes, from here. Here is mostly short lumber.

Q. But there were trucks of lumber on either side of the car you and he were working on?

A. Yes.

THE COURT: Now, that we may understand, when you were pushing that car of lumber, when Mr. Sundin told you it was dangerous, was there any other car near the car you were pushing on or not?

A. It was first in the early hours in the morning, and it was open.

THE COURT: Then the car that you were pushing was standing out by itself, was it, away from the other cars?

A. There was no car over there at the same time.

RE-DIRECT EXAMINATION by

MR. NELSON:

Q. When you were shoving like this on the side, there wasn't any car?

MR. PLUMMER: That is leading, if Your Honor please.

MR. NELSON: Then I will withdraw the question. I thought I might bring it out a little clearer, but I am satisfied if you are.

THE COURT: Anything further?

MR. NELSON: That is all, Joe.

JOHN SALSBERG, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. NELSON:

Q. What are your initials, Mr. Salsberg?

A. John Salsberg.

Q. Where do you live?

A. Coeur d'Alene, Idaho.

Q. State what experience you have had in moving trucks of lumber in a lumber yard.

A. Well, generally, when I am moving a truck I am pushing it from the back.

THE COURT: You mean how long he has worked at it?

MR. NELSON: How long have you worked in and around lumber yards, moving trucks?

A. Oh, about sixteen or eighteen years.

Q. Do you know how the men usually work in and around lumber yards when they are moving those trucks?

A. Yes.

Q. Supposing this table were a truck of lumber, where do the men generally get, to move that truck?

A. They should move it from the end, to be safe.

MR. PLUMMER: We move to strike that out as irresponsible.

THE COURT: Where do they generally stand in moving it?

A. Right on the back of the load.

MR. NELSON: Q. I will ask you whether or not,

Mr. Salsberg, a man of experiecne, from the side of a truck, can tell by a casual glance at that truck whether or not there are cross pieces in the truck of lumber?

MR. PLUMMER: I think I shall object to that as calling for his conclusion, if Your Honor please. The jury are just as good judges of that as the witness is. If he will just describe the situation and the conditions—

THE COURT: Overruled.

(Question read.)

A. When there is cross pieces in the load they can see that all right.

MR. NELSON: Q. He can see if there are cross pieces in the load?

A. Yes.

Q. I will ask you, Mr. Salsberg, in your opinion, whether or not a reasonably prudent man of experience in moving trucks of lumber would go along the side of a truck of lumber composed of six inch white pine an inch thick, and sixteen feet long, and piled from fifty-four to fifty-five tiers high, at least from fifty to sixty tiers high, when there are no cross pieces in it, and place his back up, get in the middle of the truck, and place his back up against that truck of lumber, and attempt to assist in moving it?

MR. PLUMMER: We object to that as calling for the witness' conclusion, and as not a subject of expert testimony. I would like to be heard on that, Your Honor.

THE COURT: It is unnecessary. The objection is sustained.

MR. NELSON: Q. Did you know Mr. Sundin?

A. No, sir.

Q. How many men have you seen work behind a truck of lumber such as I have described, in moving it?

A. Well, I should think about four men, two on each corner and two in the middle of the load; about four men could get around it.

MR. NELSON: That is all.

CROSS EXAMINATION by

MR. PLUMMER:

Q. Did you work in this mill down here?

A. Yes, sir.

Q. Working there yet?

A. Yes.

Q. What position do you hold?

A. I have got the contract on that.

Q. You have got a contract to cut lumber?

A. Yes.

Q. From the Rutledge people?

A. Yes.

Q. This lumber, as it is sawed, it comes right out of the water doesn't it?

A. Yes.

Q. Green lumber?

A. Yes.

Q. And sawed green?

A. Yes.

Q. And it is piled right on those cars, one right on top of the other?

A. Yes.

Q. Now, how thick is a lath?

A. About a half inch.

Q. Half an inch. Are you sure about that, that a lath is half an inch thick?

A. Probably not—

Q. A quarter of an inch?

A. Probably a quarter of an inch.

Q. You say there is a lath laid across there, some of them diagonally, and some of them even, square across, and unless they happened to come out on the outer edge you wouldn't notice them, would you?

A. There is always little openings, you know.

Q. Suppose the lath only comes to within three inches of the outside of the lumber, that lumber green and wet and packed in there tight, it would be a very thin space which would show there, wouldn't it?

A. Yes, but the lath always go outside of the load a little bit.

Q. But I am saying, assuming that they didn't, you then wouldn't see any opening there, would you, in case they didn't?

A. Well, the way we are doing it—

Q. I didn't ask you what you were doing.

A. We could see that.

Q. Well, we will say this is a board, and the lath was put in so that it only comes to about there, we will say, and didn't extend out at all over the edge,

you say then you could see the lath was still in there, on account of the opening the quarter inch lath would make?

A. It would show all right.

Q. As a matter of fact you wouldn't pay any attention to that, would you?

A. I don't know.

Q. What?

A. I couldn't tell.

Q. Suppose, for instance, that there was piles of lumber on cars on both sides of this car we want to shove out—

A. Yes.

Q. And say there is six inches of space between the two, and that there were four men on the end shoving out, and this other man had to take hold of it after it got started out from between the other two piles, he would have to catch it on the fly, wouldn't he, that is, while it was going, if it was still going and he took hold of it at all he would have to take hold of it while it was moving?

MR. NELSON: We will admit that, that is self-evident.

MR. PLUMMER: Q. And as soon as he can get hold of it he is supposed to take hold of it and keep on shoving it out, isn't he?

A. Yes, sir.

Q. Assuming that there was four men on the end—

MR. PLUMMER: Well, I think he put it that way. That is all.

RE-DIRECT EXAMINATION by

MR. NELSON:

Q. But he isn't supposed to put his back up against it, is he?

MR. PLUMMER: We object to that as leading, if Your Honor please.

THE COURT: Sustained.

MR. NELSON: Q. State how he is supposed to take hold of it if he does take hold of it at the side.

A. Well, he can take hold of the corner and push; if he is on the side he can take hold of one corner and push?

Q. As the load comes by he can take hold of the corner and help push?

A. Yes.

THE COURT: You mean the front corner or the back corner?

A. The back corner.

MR. NELSON: That is all.

RE-CROSS EXAMINATION by

MR. PLUMMER:

Q. Say here is one load on one side, and here is the load that we are moving, in the middle, and here is a load on this side, and there is six inches between these loads, and the track itself is only twenty-two feet long, and the lumber is sixteen feet long, sixteen foot lumber, on this one that we are going to move, sixteen feet long, six inches wide, and an inch thick, now as a matter of fact this end of this pile of lumber would be up over the car that you are going to put it on before you would get away from between

these other two cars, wouldn't it, if it is sixteen feet long?

MR. NELSON: We object to that, unless it is shown that this car on this side was fourteen foot lumber, as shown by the evidence in this case.

MR. PLUMMER: Mr. Hegstrom testified that it was his understanding that it was.

MR. NELSON: Your question assumes that it was sixteen feet.

MR. PLUMMER: Oh, no—sixteen feet, the one that he is shoving. You have got twenty-two feet of track and you have got sixteen feet of lumber here, and you have got to clear fourteen feet. That is thirty feet, isn't it?

THE COURT: What is it you are trying to get at?

MR. PLUMMER: He says that if he is going to work from the side at all he should get hold of this corner here, and I want to show that he couldn't get hold of that until it cleared the other two cars of lumber.

MR. NELSON: That is self-evident.

THE COURT: But he said he was supposed to take hold of the back corner. These witnesses don't seem to understand English very well. I wish you would have him show the jury and myself upon the table down there, assuming that that table is a car, show how they would get hold on the side, and the number of men, give him the number of men and start your car.

MR. PLUMMER: If there were four men on the end—

MR. NELSON: We object to that unless there are three men, it never having been proven that there were four men on this load.

MR. PLUMMER: Three men is correct.

Q. Suppose there are three men on the end here, and for any reason one of the men had to take hold of the car some other place—

THE COURT: I don't think you have the right to assume that. Suppose there are four men now to move that car, have him show us how they take hold. Suppose there were four men to move that car, and you were going to start it, how would the four men start it? Just go down and show the jury.

A. There would be one man on each corner and two in the middle, two men in the center, and there will be one man on each corner.

THE COURT: You take hold the way you would take hold if you are on the corner.

A. Like this. The load is higher up, so you can reach up a little higher.

THE COURT: Would you all stand about the way you are standing there now?

A. Yes, sir.

MR. PLUMMER: Now, of course, you understand, if Your Honor please, that we have a different theory about the necessity of four men standing there.

THE COURT: You may ask him about that theory.

MR. PLUMMER: If for any reason there wasn't room there for this fourth man, where would he take hold of the car?

THE COURT: That is assuming a condition you will have to show first.

MR. PLUMMER: I have shown it in my case. Both men testified that there wasn't room for any more men there.

THE COURT: But that is a conclusion. Your men testified about the width of this car, and about how far the tracks were apart, and, as you stated a while ago, six or eight inches, or whatever it was, between the loaded cars. Now you have those physical conditions there. Now as to whether there is room for three or ten men there is a conclusion. It is true you had your witnesses so testify, but it is for the jury to conclude whether that is true or not.

MR. PLUMMER: But I wanted him to show, in case there wasn't room for four men there, where would the fourth man stand, if he couldn't get there, is what I want to get at.

THE COURT: Of course he would have to stand on the side.

MR. PLUMMER: They claim he didn't have any right to be on the side at all.

THE COURT: You may ask him the direct question whether a man had a right to stand on the side.

MR. PLUMMER: No, I don't want to do that. I don't want to have to be bound by their witness. This is the question, Mr. Witness:

Q. If there wasn't any more room here for the fourth man, where would he take hold of the car?

MR. NELSON: We object to that as assuming something not proven, and calling for the conclusion of the witness.

THE COURT: I think the answer to that will be obvious, that if they needed four men and they couldn't stand at either end, they would have to stand at the side.

MR. PLUMMER: Unless they could pull it from the front end, and I don't suppose that would be considered. That is all.

MR. NELSON: That is all.

GEORGE STILLWELL, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. NELSON:

Q. What is your first name, Mr. Stillwell?

A. George.

Q. Where do you live?

A. Coeur d'Alene.

Q. For whom do you work?

A. The Edward Rutledge Timber Company.

Q. How much experience, that is, how long have you worked in handling trucks of lumber similar to the ones they use at the Rutledge Timber Company?

A. Between six and seven years.

Q. I will ask you if, in moving one of those trucks of lumber on the transfer platform, where the men usually stand in moving it?

A. At the end.

THE COURT: At the front end or the rear end?

A. The rear end.

MR. NELSON: Q. I will ask you, Mr. Stillwell, whether or not a man at the side of one of those trucks of lumber can tell from a casual observation of it whether or not there are cross pieces in it?

A. Yes, sir.

MR. PLUMMER: We object to that as calling for his conclusion, if Your Honor please.

THE COURT: Overruled.

MR. NELSON: Q. Well, I will ask you, Mr. Stillwell, whether or not it would be reasonably prudent for a man of experience to get alongside of a truck of lumber, white pine, one by six inches, sixteen feet long, and fifty tiers high, and help move it with his back up against that load of lumber?

MR. PLUMMER: We object to that as calling for his conclusion, and not a subject of expert testimony.

THE COURT: Sustained.

MR. NELSON: That is all.

CROSS EXAMINATION by

MR. PLUMMER:

Q. You say they usually stand on the end when they pull a car out?

A. Yes, sir.

Q. You have seen them stand on the side, haven't you?

A. Not very much.

Q. But you have some?

A. Yes.

Q. You have seen Mr. Moe, himself, work that way, haven't you, the superintendent?

A. No, sir.

Q. You have never seen him?

A. No.

Q. You are still working out there, aren't you?

A. Yes, sir.

MR. PLUMMER: That is all.

MR. NELSON: That is all. Mr. Al Johnson.

AL JOHNSON, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. NELSON:

Q. Mr. Johnson, you work for the defendant, Edward Rutledge Timber Company?

A. Yes, sir.

Q. Where do you live, Mr. Johnson?

A. Coeur d'Alene.

Q. Mr. Johnson, I will ask you whether or not you ever heard any conversation between Mr. Moe and Mr. Sundin in reference to working at the side of a truck of lumber? Yes or no.

A. Yes.

Q. Just tell where that was, and when it was, and what was said by Mr. Moe.

THE COURT: Where was it?

A. It was right on the transfer, that is, from the transfer chain there.

THE COURT: About how long before Mr. Sundin's death?

A. I couldn't say,—probably about a week or ten days.

MR. NELSON: Q. What was said by Mr. Moe at that time?

A. He spoke as a whole to all of them, of course. He didn't speak right to Mr. Sundin, but he spoke to the transfer men at the time.

Q. Was Mr. Sundin in the gang?

A. Yes, Mr. Sundin was in the gang. He says, "Boys, I don't like to have you stop alongside of a load," he says, "when you see it is dangerous that way," and he said, "I would rather have you push from behind." He says, "It is no place for a man alongside of a load."

MR. NELSON: That is all.

CROSS EXAMINATION by

MR. PLUMMER:

Q. He said, "I don't like to have you boys work alongside of a load when it is dangerous?"

A. He says, "Don't stop up alongside of a load when it is dangerous; I want you to push from behind."

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. NELSON:

Q. He said, "I want you to push from behind?"

A. Yes.

MR. NELSON: That is all.

MR. PLUMMER: That is all.

JOHN ANDERSON, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. NELSON:

Q. Where do you live, John?

A. Coeur d'Alene.

Q. Did you know Axel Sundin?

A. Yes.

Q. When he was alive?

A. Yes.

Q. Did you work with him on the transfer gang?

A. Yes.

Q. You helped shove out those trucks of lumber, did you?

A. Yes.

Q. Where did you usually stand, John, in shoving out those trucks of lumber?

A. Behind.

Q. The week before this accident did you work on the day or night shift?

A. Night.

Q. Did Axel Sundin work with you?

A. Yes.

MR. NELSON: That is all.

CROSS EXAMINATION by

MR. PLUMMER:

Q. That is where you usually stood, at the rear end, you say?

A. Yes.

Q. As a matter of fact, the men stood on the side and also on the end sometimes, didn't they?

A. No, we used to stand behind.

Q. I say some of the other men would stand on the side, wouldn't they?

A. No,—only three on the night shift.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by

MR. NELSON:

Q. You three men took out the loads, did you?

A. Yes.

MR. PLUMMER: That is leading and suggestive.

MR. NELSON: That is all.

MR. PLUMMER: That is all.

LEONARD OTTO, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. NELSON:

Q. Where do you live, Mr. Otto?

A. Coeur d'Alene.

Q. What is your trade?

A. Different trades, industrial engineering covering them as a whole.

Q. Have you examined the south side of the transfer shed there at the Edward Rutledge Timber Company?

A. Yes, time and again.

Q. You work for the company at the present time, do you not?

A. I do.

Q. Do you know where the west end of the transfer shed is?

A. Yes.

Q. How is the south side of that transfer shed constructed? On what foundation does it rest?

A. Concrete piers.

Q. How far apart?

A. Sixteen feet center to center, and eleven feet the other way.

Q. Sixteen feet apart east and west?

A. East and west.

Q. And eleven feet—

A. North and south.

Q. North and south?

A. Yes.

Q. What size timber is across these cement piers?

A. Ten by twelve.

Q. Ten by twelve?

A. Yes.

Q. What rests upon them?

A. Four by twelve floor joists.

Q. Running north and south?

A. North and south.

Q. How far apart are those?

A. Twenty-four inch centers.

Q. What flooring is on top of those four by twelve floor joists?

A. Three by ten.

MR. NELSON: That is all.

CROSS EXAMINATION by

MR. PLUMMER:

Q. How long have you been working there?

A. A year ago last November.

Q. A year ago last November?

A. Yes.

Q. It was a year last November, and from that on until now?

A. Yes, until the present time.

Q. Have you been in the same kind of work all the time?

A. Practically.

Q. What is your kind of work?

A. Construction work.

Q. Construction work?

A. Yes, sir.

MR. PLUMMER: That is all.

MR. NELSON: That is all.

THE COURT: I suppose the picture shows—these tracks are laid upon the floor he speaks of?

A. Yes, sir.

MR. PLUMMER: I don't know whether that shows the particular tracks he speaks of. I will ask him.

THE COURT: If he knows where the accident occurred, ask him—

MR. PLUMMER: Q. The floor you speak about, are those trucks that appear in that picture—

A. That is what those trucks rest on.

Q. How many tracks are there on the south side of that transfer shed?

A. Seventy short tracks.

Q. And how many on the north side of the transfer shed?

A. Seventy-two, I think.

Q. And how many tracks are there on the west end?

A. Ten.

Q. The lumber is sawed in the mill, is it not, Mr. Otto, and is carried up into this transfer shed, and then carried along it by means of an endless chain—

THE COURT: That appears, gentlemen.

A. Yes, sir.

MR. PLUMMER: I wanted the jury just to get a full idea of it.

Q. How far apart are those rails?

A. Twenty-nine inch center, the gauge of the track, and approximately four feet from center to center of tracks.

Q. How long are those trucks or cars?

A. Accurately speaking, seven foot eleven.

Q. How high is the top of this cross beam on which the lumber rests from the top of the rail?

A. It is twenty-four inches from the base of the rail to the top of the truck,—deducting two and a quarter inches from that.

MR. PLUMMER: That is all.

MR. NELSON: Mr. Clerk, may I have the depositions that were taken in this case?

MR. PLUMMER: If Your Honor please, do I understand that in reference to the depositions,—of course notices were served in regular way, but of course we didn't attend the examination, and in that case are we concluded by the answers, or can we make objections?

THE COURT: No. You may make objections.

MR. PLUMMER: Have you got a copy of the deposition?

MR. NELSON: I think I have.

MR. PLUMMER: I would like to follow them as you go along, because I might want to object before it is read.

MR. NELSON: I don't find the copy. I did have a copy.

MR. PLUMMER: Well, I will just watch over your shoulder.

THE COURT: Just read the name of the witness, and then the questions and answers.

MR. NELSON (reading):

"JOHN OLSON, being duly sworn and examined by Mr. Buffington, testified as follows:

Q. State your name, age, and place of residence.

A. John Olson, forty-five year old, and live at Akeley, Minnesota.

Q. State your business now.

A. I am in business with two other men as partners in retail lumber business here in Akeley, Minnesota.

Q. Were you ever connected with the Red River Lumber Company, and, if so, state in what capacity and for what period of time?

A. Prior to January 1st, 1917, I was employed by the Red River Lumber Company for seventeen years, here at Akeley, and during said employment I was employed at different kinds of work, and was a foreman, from about 1909 until January 1st, 1917.

Q. Did you know Axel Sundin in his lifetime,

the husband of Olga Sundin, one of the plaintiffs in this action, and the man who met his death in the State of Idaho by reason of an accident referred to in the pleadings of this case?

A. Yes.

Q. Did Axel Sundin ever live at Akeley, Minnesota, and if so, by whom was he employed, if you know?

A. Axel Sundin, I know lived in Akeley, Minnesota, in 1909 and continuously thereafter, up to the latter part of 1913, and during this period he was employed by the Red River Lumber Company here at Akeley.

Q. State if you know when Axel Sundin commenced work and how long he worked for the Red River Lumber Company, and the character of such work, and further how well you knew him?

A. I was well acquainted with Axel Sundin, and knew the kind of work he was doing here. Sundin commenced work for the Red River Lumber Company in 1909, when he was employed in the green lumber department, taking lumber from the sorting shed chain and piling same on lumber trucks, and was so employed for three weeks. In October, 1909, he worked in the dry lumber department, and worked continuously in the dry lumber department until 1913.

Q. During the time you mention, from October, 1909, until October, 1913, state with more particularity what Axel Sundin did during this period.

A. October to December, 1909, he worked in the

dry shed. His duties consisted of taking of lumber from trucks run on track, helping grader assort same, and reloading on trucks for shipping. December 1st, 1909, to May 21st, 1911, he worked in our shipping department, loading cars in which his work consisted of taking lumber from trucks on tracks and loading into freight cars. June 1st, 1909, to October 11th, 1913, he worked as grader in flooring alley. In this department he was required to unload flooring from trucks run on tracks, grade the same and reload on trucks for shipment.

Q. To sum up the general character of Sundin's work, state what he did during this period of employment.

A. During all the time he was in the employ of the Red River Lumber Company, his work was in connection with lumber trucks, and in fact his daily work consisted in loading, unloading and handling lumber, and in moving and switching lumber trucks running on narrow gauge tracks.

Q. How was your lumber handled?

A. All of our lumber was handled on the narrow gauge track system, both from our sawmill, dry lumber, dressed lumber and shipping department.

Q. Most of the time that Sundin worked here, was his work under your supervision as foreman?

A. Yes.

Q. Did you have opportunity to observe Sundin's work, and if so, further state your observation as to Sundin's knowledge of his work?

A. Yes. Sundin knew his work. He had long

experience at this work, and I considered him a competent man. He certainly understood the work.

Q. Did he ever meet with an accident here?

A. Not to my knowledge?

Q. Did you as foreman instruct the men, including Sundin, as to any dangers in connection with this kind of work, and, if so, state the general character of instruction given?

MR. PLUMMER: I think, if Your Honor please, that any instructions given in Minnesota four or five years ago about how work should have been done there is wholly immaterial as to how work should have been done here.

MR. NELSON: If Your Honor please, it appears that it was the same kind of system, with narrow gauge tracks and trucks.

MR. PLUMMER: The only thing that appears to be the same is the narrow gauge tracks. As to whether or not he got instructions is wholly immaterial.

THE COURT: If the instructions relate to a matter of this kind I will let them go in. If they are on some other subject they are wholly immaterial and irrelevant.

MR. NELSON: Your Honor would better read the answer and then you can tell. (Handing paper to Court.)

THE COURT: Well, that might or might not relate to a matter of this kind. The objection is sustained. That is, the instructions were neutral so far as this particular matter is concerned.

MR. NELSON (reading):

"Q. Could one doing the work of Sundin tell by mere observation whether there were cross pieces between the lumber piled on the trucks, or not?"

MR. PLUMMER: We object to that as simply calling for a conclusion as to a fact existing three or four years ago, back in Minnesota.

THE COURT: Sustained.

MR. NELSON (reading): "Q. Was Sundin thoroughly familiar while in the employ of the lumber company here with the loading and unloading of lumber on trucks, with pushing and moving of trucks containing piled lumber, including knowledge of danger incident to handling the same?"

A. Yes. My observation is based upon watching him work—

MR. PLUMMER: He has answered the question, and I think the balance of his answer as to observation should be stricken out.

THE COURT: No, I think not.

MR. NELSON (reading): "My observation is based upon watching him work, seeing the results of it, that Sundin knew all about his work, and unquestionably, even at a glance, could tell as well as any man could whether lumber was properly piled on a truck or not."

MR. PLUMMER: The Court can see from the latter part of the answer there—

THE COURT: The latter part may be stricken out. The jury will not consider it.

MR. NELSON (reading): "Q. I understand, Mr.

Olson, that you are not now in the employ of the Red River Lumber Company.

A. No, I am in business for myself.

Q. Have you any interests whatsoever in the outcome of this law suit?

A. No."

MR. PLUMMER: Can't we agree that the next two depositions are the same?

MR. NELSON: Yes, they may be considered read in evidence. They are practically the same.

THE COURT: You may do as you please, either read them or not.

MR. PLUMMER: It is just repetition of two other men, who say the same thing he does.

MR. NELSON: I am perfectly willing to agree that two other men testified to practically the same facts, and that these depositions may be considered read in the record.

THE COURT: Very well.

MR. PLUMMER: That is, the depositions that would testify to the same facts as the one you have read, because I don't want the whole thing to go in.

MR. NELSON: If Your Honor please, as I understand the ruling of the Court, Your Honor would hold that is is a conclusion of the witness to testify as to whether or not a reasonably prudent man with experience would go alongside of a load of lumber in the position the deceased took?

THE COURT: Yes, I think that is a question for the jury, in the light of all the circumstances, rather than for expert testimony.

MR. NELSON: The defendant rests then.

MR. PLUMMER: We rest.

THE COURT: Gentlemen of the jury, you may be excused until two o'clock, and remember the admonition of the court heretofore given you. Keep yourselves free from outside influences. Two o'clock.

(The jury thereupon retired from the court room, whereupon the following proceedings were had, to-wit:)

MR. NELSON: At this time, if Your Honor please, I desire to file a motion for a directed verdict, and haven't set forth in my motion upon what grounds, but upon the ground especially that the uncontradicted evidence on the part of the plaintiff shows that if there was negligence on the part of anyone in this case it was upon the part of a fellow servant of the deceased Axel Sundin, and that the plaintiff assumed the risk of the injury that resulted in his death, and that he was guilty of contributory negligence which was the proximate cause of his death.

(Argument upon motion by respective counsel.)

An adjournment was taken until 1:30 p. m.

1:30 p. m., Monday, June 4, 1917.

THE COURT: Gentlemen of the jury, in the view I have taken of the law of this case, I feel impelled to instruct you to find a verdict for the defendant. As a rule, in giving such an instruction, I briefly explain to the jurors why it is done, in order that they may not feel that the court acts arbitrarily. Of course, in all cases of this character, or nearly

all of them, the condition of the plaintiff makes a strong appeal to the sympathy of all people, but, as courts, we must enforce the law as we see it. The theory upon which the plaintiff, upon behalf of herself and her children, has sought recovery in this case is that the defendant company, by whom the deceased was employed, was negligent, in that it didn't pile this particular load of lumber upon the truck in question in the usual way, with cross ties to keep one or more of the tiers of lumber from toppling over and falling to the floor, and further that the tracks connecting with the larger car, which was used to haul the trucks to the place where the lumber was being piled, were not upon the same level with the tracks upon the general floor. Now you gentlemen will doubtless find that somebody was negligent in the matter of piling this lumber upon the truck. From the evidence that would be a very natural conclusion. But that negligence, such as it was, was on the part of others employed in the same department, in the same general line of service with the deceased, and they were what in law we call fellow servants, that is, fellow workmen, and for the negligence of one's fellow servants the employer is not responsible. A rough illustration would be, where you as a farmer, employed two men to go out, and harvest your hay, and one of them, who was loading the hay, loaded it very carelessly, in such a way that the load toppled over and it fell upon the man below pitching the hay on the load, you, as employer, would not be responsible, because you could not anticipate that the

man loading the hay was going to be negligent. So in this case the men who loaded this lumber upon the particular truck were the fellow servants of the deceased, and, unfortunate though the accident may have been, the defendant company could not be held responsible for the careless act of these other employees.

The other negligence referred to, as I have already stated, is that the track at this particular point was permitted to get out of order and become a little lower than the other track, some testimony tending to show that it was in the neighborhood of an inch and a half lower. It is alleged in the complaint that the deceased knew of this faulty condition or defective condition of the track, and that he said something to the company, or an officer of the company, about it, at least that he knew of it, but whether that had been alleged or not the evidence would seem to leave no doubt that he did know of it, for as testified to by the several witnesses, when they started to put this truck load of lumber upon the transfer car, it met with this obstacle; they pushed it forward until it reached the track on the car, and it would go no further, and they pulled it back to give it a start, and again tried, and they did this at least twice, and I think some of the testimony shows that they did that three times. And it is further shown that he was at the side of the car, had a hold about the middle of the car or truck, so that even had he not made this allegation in his complaint the inference would be inevitable, unavoidable, that he knew of

the obstruction there, and I can't escape the conclusion that it must appear to all that he, with his age and experience, and apparent intelligence, must have been able to appreciate what would be obvious to a child, that rolling this heavy truck against the two projecting ends of the rails would jar the truck,—that must have been appreciated by him,—and that the jar would tend to dislodge the lumber, that is, it would give a shock to the lumber, and if any of it was loose it might fall off,—not that it would, but it might, so that, as an intelligent man, he was bound to take cognizance, knowing of the obstacle there, the projection over which the wheels had to roll, it was incumbent upon him to take knowledge that there would be some danger, and to protect himself against the danger. That isn't necessarily saying that he knew that this lumber was not properly bound by the cross ties. I do not make any such suggestion as that at all. But he was able to appreciate the fact that rolling this heavy truck load of lumber against the projecting ends of the rails upon the transfer car would give the truck a shock which would tend to dislodge the load being carried upon the truck.

You may go to your room, and I will send in a form of verdict. You may elect a foreman, and I will send in a form of verdict, which your foreman will sign. The verdict will be in favor of the defendant. You will understand that you take no responsibility at all in a matter of this kind, and the entire responsibility is upon me for this verdict.

You may swear the bailiff, Mr. Clerk.

(Bailiff sworn.)

THE COURT: Mr. Clerk, you may prepare the form of verdict, and let it recite that it is upon my instruction. You may retire, gentlemen.

The plaintiffs may have an exception.

(The jury retired from the court room.)

MR. PLUMMER: If Your Honor please, I don't know what the practice has been here. What bond would be satisfactory?

THE COURT: A bond of two or three hundred dollars.

MR. PLUMMER: Would two hundred be enough?

MR. NELSON: I think two hundred would.

THE COURT: It is just a bond for costs.

MR. NELSON: Two hundred would be sufficient.

THE COURT: Two hundred dollars. Do you want any time in which to prepare a bill of exceptions?

MR. PLUMMER: I would like to have sixty days, Your Honor. I think I will prepare it in a shorter time than that, but I would like to have that much time.

THE COURT: You may have sixty days.

MR. NELSON: How long may we have then?

THE COURT: You don't need any bill of exceptions.

MR. NELSON: To suggest amendments.

THE COURT: The rules provide for that, and that will be sufficient time for you probably. I think it is ten days. If you need any additional time,—

I think the rules give you sufficient time, and would give the plaintiffs sufficient time if they had the testimony, but it will take some time to get the testimony out. If you feel that you need more time, it can probably be arranged.

(The jury returned into court.)

*In the District Court of the United States for the
District of Idaho, Northern Division.*

No. 672.

Olga Sundin, and Marguarette Sundin, Iver Sundin,
and Eugene Sundin, minors, by Olga Sundin, their
guardian ad litem,

Plaintiffs,

vs.

Edward Rutledge Timber Company, a corporation.

Defendant.

VERDICT.

We, the jury in the above entitled cause, upon instructions of the court, find for the defendant.

ROBERT T. HORN, Foreman.

(Title of Court and Cause.)

ORDER SETTLING BILL OF EXCEPTIONS.

Now, on this date, the above cause coming on for hearing upon the application of plaintiffs to settle the bill of exceptions in said cause, and it appearing to the court that the plaintiffs' proposed bill of exceptions was duly served upon the attorney for defendant within the time provided by law, and that no amendments have been suggested thereto by the

defendant, excepting as now incorporated therein, and the court having duly allowed said Bill of Exceptions, and the amendments thereto;

The Court does hereby Order and Certify that said bill of exceptions contains all of the material facts occurring in the trial of said cause, together with the exceptions thereto, and all the material matters and things occurring upon the trial, including the exhibits offered and admitted in evidence in said cause, which exhibits are hereby made a part of this bill of exceptions and the Clerk of this court is hereby ordered to transmit such exhibits with this bill of exceptions to the Clerk of the United States Circuit Court of Appeals, for the 9th Circuit, holding terms at San Francisco, California, should a Writ of Error be taken out in this cause; that said bill of exceptions is a true bill of exceptions and the same is hereby settled as a true bill of exceptions in this cause, and the same is hereby certified accordingly by the undersigned, Judge of the above entitled court, who presided at the trial of said cause; that it conforms to the truth, and the Clerk of this court is hereby ordered to file the same as a record in said cause.

Dated at Boise, Idaho, this 14th day of August, 1917.

FRANK S. DIETRICH,
District Judge.

Lodged June 29, 1917.

Filed August 14, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

PETITION FOR WRIT OF ERROR.

Plaintiffs in the above entitled cause, feeling themselves aggrieved by the rulings of the Court, and the judgment entered in this cause, complain in the record and proceedings had in said cause, and also of the rendition of the judgment in the above entitled cause in said United States District Court against said plaintiffs, that manifest error hath happened to the great damage of said plaintiffs, petition said court for an order allowing the said plaintiffs to prosecute a writ of error to the Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided and that the giving of the bond by plaintiffs, heretofore fixed by the court in the sum of \$200.00, as provided by law, all further proceedings of this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioners will ever pray.

Dated this 16th day of August, A. D. 1917.

PLUMMER & LAVIN,

Spokane, Washington.

BLACK & WERNETTE,

Coeur d'Alene, Idaho.

Attorneys for Plaintiffs.

Endorsed: Filed Aug. 18, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ASSIGNMENTS OF ERROR.

Comes now the above named plaintiffs, and file, serve, and submit their assignment of errors, claimed to be committed by the Court, against plaintiffs in the above entitled action, that is to say:

(1) The Court erred in granting defendant's motion for a directed verdict, at the close of all of the evidence.

(2) The Court erred in directing the jury to render a verdict against plaintiffs, and in favor of defendant.

(3) The Court erred in rendering judgment upon said verdict.

(4) The Court erred in refusing to permit plaintiffs to show by the evidence in the trial of said cause, that the deceased Sundin was required to work very rapidly, and in a rushing and hurried manner, at the time of his injury, resulting in his death, which, if true, would have been a circumstance to have been considered by the jury, in determining whether or not he, Sundin, ought to have, or did, observe and be advised of the absence of cross-pieces or binders through and within the load which collapsed, causing his death.

(5) That the Court erred in permitting defendant, on cross examination of plaintiffs' witness Andrew Moe, to permit and require said Moe to testify to the effect "That a man of ordinary experience in handling lumber on trucks, can tell by casual observation, whether or not there are cross-pieces in the load," and also, "That an ordinary man, who had had

experience in loading lumber and shoving these trucks, for a month or six weeks, could tell by a casual examination of it, from the side of it, that there were, or were not, cross-pieces, or binders in a load.

Plaintiffs claim that the admission of said testimony was not cross-examination, and secondly, that it was simply calling for the personal conclusion of the witness, and not a subject of expert testimony, but the jury would have a right to consider all of the circumstances incident to the work, as the same was being carried on, in order to arrive at a just conclusion of whether or not Sundin ought to have noticed the absence of cross-pieces through the load.

(6) The Court erred in making the statement in the presence of the jury as follows:

“RE-CROSS EXAMINATION by
MR. NELSON:

Q. Mr. Moe, do you know whether or not it is customary for a man to place his back up against a load fifty tiers high, in which there were no cross-pieces, that was being moved down onto the transfer track? Would that be customary under your observation during your time there as foreman?

MR. PLUMMER: If Your Honor please, I object to that on the ground that it isn't shown so far that it was customary to have cars without the pieces in them. Therefore it wouldn't be proper cross-examination.

THE COURT: No, it isn't shown, nor is it shown that it was customary for men to take hold of a car in this way. He said it was sometimes done. He

also stated that they weren't supposed to do it."

(7) The Court erred in sustaining defendant's objection to questions asked of witness Brewsted by plaintiffs' counsel, as follows:

"Q. Tell him to show the jury how the men usually took hold of it when they took hold of the side of the car at all.

A. This way (indicating).

Q. How long did that custom exist there?

MR. NELSON: We object to that as incompetent, irrelevant and immaterial, and not pleaded, and the defense has had no opportunity to meet it.

THE COURT: Sustained. He need not answer."

(8) The Court erred in excluding the proposed testimony offered by plaintiffs' counsel when they attempted to show by witness Brewsted, how much the track had sunk between Saturday and Monday morning, at the time of the accident.

(9) The Court erred in refusing to permit plaintiffs to show the fact that the rails of these short tracks were usually and ordinarily kept and maintained on a level with the track, located upon the transfer car, and also the refusal of the court of plaintiffs' offer of proof, which offer was as follows:

"MR. PLUMMER: Plaintiffs offer to show by this witness that all of the other tracks which run parallel to the track upon which the car was running that caused the injury to the deceased were ordinarily and usually kept and maintained on a level with the cross tracks on the transfer car, upon which transfer car the deceased and his co-employees were attempting to place the loaded car of lumber."

Dated at Spokane, Washington, this 16th day of August, A. D. 1917.

PLUMMER & LAVIN,
Spokane, Washington,
and BLACK & WERNETTE,
Coeur d'Alene, Idaho.
Attorneys for Plaintiffs.

Endorsed: Filed Aug. 18, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ORDER ALLOWING WRIT OF ERROR.

Upon petition of plaintiffs, through their attorneys of record,

It Is Ordered, that a writ of error be, and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be the amount heretofore fixed by the court, to-wit: the sum of \$200.00 which said bond may be executed by said plaintiffs as principals, through their attorneys herein, and by such surety or sureties as shall be approved by the court, and which when executed shall operate to suspend any further action on said judgment by this court, pending the determination of such writ of error.

Dated this 18th day of August, A. D. 1917.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed Aug. 18, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

BOND ON WRIT OF ERROR.

Know All Men By These Presents:

That we, Olga Sundin, on her own behalf, and as Guardian ad Litem for Marguarette Sundin, Iver Sundin, and Eugene Sundin, minor children of said Olga Sundin, as principals, by Plummer & Lavin, their attorneys of record, and National Surety Company, as surety, are held and firmly bound to the Edward Rutledge Timber Company, a corporation, the above named defendant in the full and just sum of \$200.00, well and truly to be paid, we bind ourselves, and our and each of our successors and assigns, firmly by these presents.

Sealed with our hands and dated this 16th day of August, A. D. 1917.

Whereas, lately at the May term, A. D. 1917, of the District Court of the United States for the District of Idaho, Northern Division, in a suit pending in said court between said principals and said Edward Rutledge Timber Company, a corporation as plaintiffs and defendant respectively, a final judgment was rendered against said plaintiffs and said plaintiffs, having obtained from said court, a Writ of Error, to reverse the judgment in the aforesaid suit, and a citation directed to said defendant is about to be issued, citing and admonishing it to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, thirty days from and after the filing of said citation;

Now, the condition of the above obligation is such, that if said plaintiffs should prosecute their writ of error to effect and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and effect.

Olga Sundin,
Marguarette Sundin,
Iver Sundin,
Eugene Sundin,
By Olga Sundin, their guar-
dian,
By Olga Sundin,
Guardian ad Litem,
By Plummer & Lavin,
Black & Wernette,
Attorneys of Record.

Principals.

NATIONAL SURETY COMPANY,
James A. Brown,
Resident Vice President.
S. A. Mitchell,
Resident Assistant Secretary.
Surety.

(Corporate Seal.)

The foregoing bond is hereby approved, this 18th day of August, 1917.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed Aug. 18, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

PRAECIPE.

*To the Honorable W. D. McReynolds, Clerk of the
United States District Court, Boise, Idaho.*

The undersigned attorneys of record for plaintiffs in the above entitled action, hereby request that you prepare and have printed, a transcript of the record in the above entitled cause, for presentation to the Circuit Court of Appeals for the Ninth Circuit, for hearing during the October, 1917, term; and that you only include in said transcript, the following papers:

Complaint, Answer, Bill of Exceptions, including photograph, being Exhibit No. 1, Judgment, Order Settling Bill of Exceptions, Assignment of Errors, Petition for Order Allowing Writ of Error, Order Allowing Writ of Error, Writ of Error, Bond on Writ of Error, Citation on Writ of Error, which shall include all endorsements on each of said papers, and which shall include the certificate of the Court settling the Bill of Exceptions.

PLUMMER & LAVIN,

Spokane, Washington.

BLACK & WERNETTE,

Coeur d'Alene, Idaho.

Attorneys for Plaintiffs.

Endorsed: Filed Aug. 18, 1917.

W. D. McReynolds, Clerk.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

OLGA SUNDIN, et al., *Plaintiffs,*

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a
corporation, *Defendant.*

WRIT OF ERROR.

*The President of the United States of America, to
the Honorable, the Judge of the District Court
of the United States for the District of Idaho,
Northern Division, Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said district court before you at the May, 1917, term thereof, between Olga Sundin, and Marguar-ette Sundin, Iver Sundin, and Eugene Sundin, minors, by Olga Sundin, their Guardian ad Litem, as plaintiffs, and the Edward Rutledge Timber Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by its complaint appears;

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid and all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ of error, so that you have the same at the city of San Francisco, in the State of California, in time for the hearing of said cause in the October, 1917,

term thereof, in the said Circuit Court of Appeals, to be then and there held, to the end that the record and proceedings aforesaid being inspectd, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this 18th day of August, A. D. 1917, of the Independence of the United States the one hundred forty-first year.

W. D. McREYNOLDS,

*Clerk of the District Court for the District
of Idaho, Northern Division.*

(Seal.)

Allowed by:

FRANK S. DIETRICH, *District Judge.*

Filed Aug. 18, 1917.

W. D. McReynolds, Clerk.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

OLGA SUNDIN, et al., *Plaintiffs,*

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a
corporation, *Defendant.*

CITATION ON WRIT OF ERROR.

The President of the United States, to Edward Rutledge Timber Company, a corporation, and to Ralph S. Nelson, its attorney of record, Greeting:
You are hereby cited and admonished to be and

appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the District of Idaho, Northern Division, wherein Olga Sundin, on her own behalf, and as Guardian ad Litem for Marguarette Sundin, Iver Sundin, and Eugene Sundin, minors, are plaintiffs, and the Edward Rutledge Timber Company, a corporation, is defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this 18th day of August, 1917, A. D., and the Independence of the United States the one hundred and forty-first.

FRANK S. DIETRICH,
*United States District Judge, for
the District of Idaho.*

(Seal.)

Attest:

W. D. McREYNOLDS, *Clerk.*

Due and legal service of the above citation, acknowledged this 23rd day of August, A. D. 1917.

RALPH S. NELSON,
Attorney for Defendant in Error.

Filed Aug. 18, 1917.

W. D. McReynolds, Clerk.

RETURN TO WRIT OF ERROR.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

W. D. McREYNOLDS,

(Seal.)

Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 162, inclusive, contain true and correct copies of the Complaint, Answer, Judgment, Bill of Exceptions, Order settling Bill of Exceptions, Petition for Writ of Error, Assignment of Errors, Order allowing Writ of Error, Bond on Writ of Error, Praecipe, Writ of Error, Citation, Return to Writ of Error and Clerk's Certificate, in the above entitled cause, which constitute the transcript of the record and return to the annexed Writ of Error.

I further certify that the cost of the record herein amounts to the sum of \$225.65, and that the same has been paid by the plaintiffs in error.

Witness my hand and the seal of said Court, affixed at Boise, Idaho, this 8th day of September, 1917.

W. D. McREYNOLDS,

(Seal.)

Clerk.

8029

United States
Circuit Court of Appeals
For the Ninth Circuit

OLGA SUNDIN, and MARGUERETTE SUNDIN, IVER SUNDIN, and EUGENE SUNDIN, Minors, by Olga Sundin, their Guardian *ad Litem*,

Plaintiffs in Error,

vs.

EDWARD RUTLEDGE TIMBER COMPANY,
a Corporation,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

*Upon Writ of Error to the United States District
Court of the District of Idaho, Northern
Division.*

PLUMMER & LAVIN,
Spokane, Washington,

BLACK & WERNETTE,
Coeur d'Alene, Idaho,

Attorneys for Plaintiffs in Error.

Filed

SEP 17 1917

F. D. Menckton

Clerk

United States
Circuit Court of Appeals
For the Ninth Circuit

OLGA SUNDIN, and MARGUERETTE SUNDIN, IVER SUNDIN, and EUGENE SUNDIN, Minors, by Olga Sundin, their Guardian *ad Litem*,

Plaintiffs in Error,

vs.

EDWARD RUTLEDGE TIMBER COMPANY,
a Corporation,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

This Writ of Error is prosecuted for the purpose of reversing a judgment of the district court, based upon a verdict of the jury, directed by the court, at the close of all of the evidence of the case.

But three questions of law are involved, other than claimed errors at law committed by the Court, in the admission and rejection of evidence, to-wit: Fellow servant, assumption of risk of the deceased, Alex Sundin, and concurring negligence of the master with that of fellow servants.

The negligence of the defendant which caused the injury and death of deceased is practically admitted, for the reason that the same was undisputed by the defendant. All adverse rulings of the trial judge were deemed excepted to, without exceptions being taken, as the trial progressed.

STATEMENT OF THE CASE.

ALEX SUNDIN, the father of the minor children, plaintiffs, and the husband of plaintiff Olga Sundin, was, on the 15th day of May, 1916, in the employ of the defendant company, as a member of a transfer gang of laborers, assisting in the operation of defendant's saw milling plant near Coeur d'Alene, Idaho. The company was engaged in manufacturing lumber. Its plant consisted of a sawmill, lumber yards, tracks, cars, and equipment of the character ordinarily used in large lumber manufacturing plants in the vicinity. Lumber was transported from the mill by means of an endless chain arrangement, out to the end of the sawmill proper. There the lumber was taken from the endless chain conveyer, by a gang of workmen designated, in the evidence, as the "chain gang." This chain gang's exclusive duties were to take the lumber from the conveyer, and load it

upon mill cars, and thereafter, as the cars were from time to time loaded, another gang, known as the "transfer gang," would, by hand power, shove these cars out, along and upon a short track, extending at right angles with the sawmill building and conveyer, and the car of lumber would be run upon tracks upon a transfer car, and thereafter, when two of the loads of lumber had been placed upon the transfer car, this transfer gang would run this transfer car upon another track, upon which the transfer car stood, out into the yards of the company, and said lumber was thereafter stacked in the ordinary lumber piles.

The exclusive duties of the transfer gang, of which Alex Sundin was a member, was to take the small cars, after they had been loaded by the chain gang, out into the yards, as heretofore described. The deceased and his gang, the transfer gang, had nothing whatever to do with loading the lumber on the cars from the endless chain conveyer. Neither was it his, or its, duty to inspect or superintend the manner in which the lumber was loaded upon said small cars, and had no opportunity so to do. On the side of the mill where the injury occurred, there were 68 short tracks extending out from the mill at right angles, from 22 feet to 30 feet in length. The transfer

car, upon which the cars of lumber were placed, was run and operated upon a track, running parallel with the mill, and at right angles with the short tracks, so that small cars could be run upon the floor of said transfer car from all of these 68 or 70 short tracks, as occasion would require. When a small car was loaded by the chain gang, the yard foreman would order the transfer gang to shove the car out at the end of the short track, and run it up on the transfer car, and have them take it out in the yard. This transfer gang would then come back and, as designated by the yard foreman, would immediately take out another car as ordered by the foreman.

In loading the lumber upon the small cars by the chain gang, it was the orders of the company and the custom to place in between the several layers of lumber, lath, to be used as cross-pieces or binders, the purpose of which was to prevent the load or any part thereof from falling off, while the same was being moved onto the transfer car, and out into the yards of the company. The loading of the cars, and the work being performed by the transfer gang was all under the special supervision, control, and direction of the yard foreman, Andrew Moe, whose duty it was to see that the work was properly performed accord-

ing to the orders of the company, and rendering safe the handling of the loads of lumber, by the transfer gang, which included the deceased.

The load of lumber which fell off of one of said cars, and caused the death of Alex Sundin, was not provided with cross-pieces or binders, which would have held the load together, had the same been placed thereon, said condition being one of the contributing causes which produced the collapsing of the load. The chain gang had negligently omitted to comply with their duty and the orders of the company in failing to place these cross-pieces or binders through the load, and the company had negligently failed in its superintendence of said work, to see that said load of lumber was safely and securely loaded so that the same would not collapse, and fall by reason of the ordinary and usual vibration or shock, produced in moving said car under the conditions of the track, then existing.

Alex Sundin knew of the custom and requirement of the chain gang and the duties of the yard foreman to see that said binders were placed in said loads, he, Sundin, having worked in the yard at this same class of work for a month and a half, and he having been an experienced man in that class of work.

When this load, which fell, was loaded, the foreman, Andrew Moe, ordered Sundin and his gang, consisting of Brewstead, Knudson, and Egstrom, to take this load out into the yard, in the ordinary and usual manner. There was not sufficient room for all four men to shove the car from behind, and under such circumstances, it was customary and proper for one of said transfer gang to take hold of the side of the car with his back to it, his hands holding the load, and shoving the car in that manner. Egstrom, Brewstead, and Knudson started the car from behind, and as the same emerged from between other cars of lumber on parallel tracks, either partially or wholly loaded, Sundin caught hold of the side of the car, as was usual, while the car was "on the fly," and all four men continued moving the car until it had proceeded about ten feet, and had arrived at the end of the rails, opposite the rails located on the floor of the transfer car.

The company had permitted, negligently, the sinking of the track over which the car was being propelled so that the short track that the car was on, was about an inch and a half lower than the short rails on the transfer car, and in order to get said car of lumber upon the transfer car, said four men, including Sundin, made two or three

trials by pulling the car backward and shoving it forward. The third time the attempt was made the load collapsed, and about one hundred boards, 1x6x16 feet, green lumber, fell off, down and upon Sundin, producing injuries which caused his death. If the tracks had been in reasonably safe condition, the same would have been maintained on a level with the rails on the transfer car, and no material shock to said car of lumber would have been occasioned, and said lumber would not have fallen, although the company had neglected to cause the usual binders and cross-pieces to be constructed and built therein, as the lumber was being loaded. In other words, it was the two conditions that produced the death of Alex Sundin.

The cross-pieces or binders being thin lath, were sometimes put in diagonally, so that the ends of the same could not be observed from the side, or the absence thereof noticed by a person performing the work which, and where, Sundin was performing in moving the car. The whole time consumed, from the time the car was first started by the transfer gang, until Sundin was injured, was only three minutes according to the evidence. The car of lumber consisted of six tiers of boards, 1x6x16 feet long, being from 45 to 50 boards high. The width of the car floor was about 48 inches,

and the rails upon which the wheels ran, but 24 inches in width. It was customary to put in from two to six strips in each load of this kind of lumber. The accident happened on Monday morning, May 15, 1916, upon the first load that was taken out by the transfer gang, upon this particular track. The previous week Sundin had been working on a night shift, and Saturday night, when Sundin quit the night shift, the track was about $\frac{3}{4}$ of an inch lower than the level of the track on the transfer car, of which Sundin had knowledge, and at the time the accident occurred, the track had settled from Saturday night to Monday morning until it was an inch and a half lower, of which Sundin had no knowledge. The cross-pieces used in these loads were "nearly all the time" kept overhead where the chain gang could get them. In moving these cars of lumber, there being only about 6 inches between the loads standing on the several tracks, Sundin could not get in between the cars when they were being started, so as to observe whether or not the binders had been put in, even if he had time to do so, but he had to grab hold "anywhere he could" while the car was in motion.

There was testimony to the effect that Moe, the yard foreman, had warned the men in presence of

Sundin, not to shove the car from the side "when it looked dangerous." He explained on redirect examination, what he meant by the term "looked dangerous" was when the load was improperly loaded, that is, leaning to one side or the other, or for any reason appeared liable to collapse. No warning was ever given about "absence of strips."

The car had only gotten about 3 feet on the transfer car when the lumber fell. This particular track was only 22 feet long. The car itself was 8 feet long. The car was being moved as rapidly as possible under the orders of the company.

Exhibit No. 1, being a photograph exhibited in evidence, will show the court the general arrangement of the tracks and loads of lumber. Sundin was never around the yard where, and when, the lumber was being loaded on the small cars, with any opportunity to observe whether or not cross-pieces or binders were being inserted. It would take the transfer gang from 5 to 12 minutes to take each load out in the yard. All of the load which fell had not emerged from between the other loaded cars, at the time of the accident, so that Sundin had no opportunity to note whether or not binders were put in that part of the load con-

cealed by the cars standing on either side, even if they always extended through the load. It is customary to put in more cross-pieces or binders in narrow lumber, like that which fell, on account of it being "easier for that kind of lumber to fall off."

In plaintiffs' complaint it is alleged that Sundin knew of the uneven condition of the track. The evidence showed, however, without objection, that when the accident occurred, the track had sunken more than double the distance, to-wit: an inch and a half, than it was sunk on Saturday night, the last time Sundin worked on it, previously to the accident.

During the trial of the case, the Court permitted certain testimony, over the objection of plaintiffs' counsel, and rejected certain testimony and made certain remarks and rulings which we will take up in the order of the assignment of errors, and in detail, to the end that this Court may rule upon the same, in view of another trial, so that the trial Court may be guided by said rulings.

The deceased, at the time of his death, was 39 years of age, and in good health. He left a widow, and three minor children, who are the plaintiffs in this action. From the evidence Alex Sundin

appeared to be a careful, steady, painstaking workman, and one who was devoted to his family, and the providing of a home and maintenance for them.

At the conclusion of the evidence, the defendant moved the Court to instruct the jury to render a verdict for the defendant upon the ground that the death of Alex Sundin is conclusively shown to have been caused by the negligence of fellow servants of the deceased, and that Sundin assumed the risk of the injuries which resulted in his death, and that he was guilty of contributory negligence, which was the proximate cause of his death. The Court sustained the motion, and instructed the jury accordingly, eliminating, however, the claim of contributory negligence. The opinion of the Court and instructions to the jury, being made a part of this record.

Plaintiffs, in resistance of said motion, contended:

(1) That the safe loading of the lumber on the cars, which required the placing therein of cross-pieces or binders, was a non-delegable duty of the master, and the failure to use reasonable care to see that said loads were loaded safely by the chain gang, was negligence on the part of defendant, and the company cannot escape liability by delegating

that duty to other servants, whatever be their rank.

(2) That even though it should be held that failure on the part of the chain gang to place binders in the load and of the foreman failing to see that this was done was negligence of fellow servants, even then, it was at least a question of fact for the jury, as to whether or not, the load would have collapsed, and Sundin been killed, but for the condition of the tracks, negligently suffered and maintained by defendant, which Sundin was required to use, and which required the transfer gang to cause a shock to said car of lumber, in attempting to force it upon the transfer car tracks, striking the projecting rails thereof, and, negligence on the part of the company in this particular being practically conceded, it certainly was at least a question for the jury as to whether or not the *negligence of the master concurred with the negligence of fellow servants*, which produced the injury and death of the deceased.

(3) That while the complaint alleges Sundin knew of the *uneven* condition of the tracks, the evidence, which went in without objection, showed that the track was much lower, at the time of the accident, than it was the last time it was used by Sundin, the Saturday night previous, on the night shift, and therefore, he, Sundin, could not be held,

as a matter of law to have anticipated, appreciated, and realized the amount of shock which would be caused to the load of lumber in making two or three trials to force it over these uneven rails, and its resulting collapse.

(4) That even if it be held that Sundin knew of the exact condition of the rails at the time of the accident, and the shock which would be caused to the load of lumber, on account of forcing it over these rails, there being evidence that Sundin did not know of the absence of the cross-pieces and binders in the load, he could not have anticipated and assumed the risk incident to the collapsing of a load which he had a right to assume and believe had been loaded in a safe, secure and stable manner, and which in all reasonable probability would not have collapsed and fallen even with the existing condition of the rails, had the same been loaded in the usual and ordinary manner, and reasonably safe.

In explaining to the jury the Court's reason for directing a verdict, it erroneously compared this accident to an incident where "two men are sent out by a farmer to load hay on a wagon, both men engaged in doing the loading." The load being loaded unsafely, it falls off, and injures one of the men who had assisted in loading it.

It is a familiar rule of law, oftentimes enunciated by this Court, and every other court, that where a challenge to the sufficiency of the evidence is interposed, the Court should consider not only the evidence, but all reasonable inferences which can be drawn from the evidence, in that light most favorable to the plaintiff. Therefore we have omitted from the above statement defendant's contradictory evidence. We will take up in the proper order our several contentions as to the law applicable to this case, so that they may be considered in logical order, and ruled upon by the Court.

WAS THE NEGLIGENCE, TO SAFELY LOAD THE CAR OF LUMBER THE NEGLIGENCE OF THE DEFENDANT, OR SIMPLY THE NEGLIGENCE OF A FELLOW SERVANT OF DECEASED?

In considering this question, the Court must not get away from the fundamental principles involved. It is safer to follow general principles, than it is to find special decisions where the facts are the same, although we will cite a few decisions of that character in this brief. If we look to the "initial decision" on this question, being the case of *Railway Co. vs. Farwell*, embraced in the early decisions of the State of Massachusetts, which rea-

sons out the equities and justice of the fellow servant rule, it will be seen that the basic principle of the fellow servant rule is, "That it would be an injustice, to charge the master with liability, on account of the spasmodic and unanticipated act of a servant, producing an injury to another servant, and which could not have been prevented by any exercise of caution or care on the part of the master"; "that the injured servant has a better opportunity to observe, and anticipate negligent acts of his fellow servants, of a spasmodic character, than the master could possibly have; that one servant has the opportunity to influence care, upon the part of others working with him, in the same character or line of work."

It was never intended by the decision in the Farwell case, *supra*, to create an "unbridled license" to declare, every employe a fellow servant with every other employe. In this day and age all large manufacturing enterprises, are operated through the medium of corporations. Everyone connected with the corporation, in carrying out the main object, is, in some decree, a co-servant with every other servant. Corporations cannot operate in any other manner. In the case at bar, of course, it is conceded that everyone connected with this lumbering enterprise and producing lumber, from the

man who takes the logs out of the lake, up to the man who stacks the lumber out in the yard, are co-servants of each other, engaged in a common enterprise, the same as the operation of a railroad, or any other large enterprise, and if the Courts are going to hold, that every man is a fellow servant with every other man who is engaged in the same general enterprise, for whose acts of negligence the company is not responsible, then the law of liability of master to servant, has been repealed by the Courts.

Sundin, the deceased, belonged to the transfer gang. This gang's duties were wholly separate and independent of the chain gang, who had charge of the loading of the cars. Their duties and labors were as distinct as any other two branches of the work of producing lumber. Sundin had no power to give any orders to the chain gang, nor opportunity to inspect the loads, to see if they were properly bound, nor to order binders put in if the gang was forgetting or neglecting to do so; in fact he had nothing whatsoever to do with loading these cars of lumber, any more than a brakeman on a freight train would have to do, with loading cars of lumber or cars of machinery, or cars of anything else, which he, the brakeman, was required to work in and about in the act of transportation.

Sundin never knew what load was to be taken out in the yard until he was directed to take it out, by the yard foreman. The yard foreman was the man to whom the company had delegated the duty of saying when the load was *ready* to be moved by the transfer gang. The load could not be moved until this order was given, and the order to move any load, was in itself, an implied assurance on the part of the company, acting through its foreman, Andrew Moe, that said load was safe to handle, considering the conditions of the track and other appliances, which the deceased was required to use in performing his labor, of all of which the foreman had knowledge, and it was not for Sundin "to reason why, *his* but to do and die."

In the case at bar, Moe, the yard foreman, ordered Sundin, Brewstead, Knudson, and Egstrom to take out this particular car. Brewstead, Knudson, and Egstrom, according to custom, braced themselves with their backs to the end of the car, and moved the car from between other loaded cars until it had emerged about half way out upon the track from the other loads, when Sundin was required to, and did catch it "on the fly" (in the language of one witness), with his back to the side of the car, his eyes facing in an opposite direction, and continued to keep the car in motion so

as to place it upon the transfer car, never having the slightest opportunity, to observe, whether or not the company had performed its duty in providing cross-pieces through the load to keep it from collapsing, even if it had been his duty to have "inspected and observed," which subject we will discuss later in this brief under the heading of "Assumption of Risk." We insist that the company owed to the deceased the non-delegable duty of superintendence. The company knew or ought to have known the condition of these tracks, that it would be necessary to shock the load more or less in forcing it over these uneven rails. The company neglected to either repair the rails, remove the danger incident thereto, or to superintend the work of the chain gang, in seeing to it that said load was so provided with binders, and loaded in such a safe manner, as to prevent it from collapsing, when receiving the shock necessary for it to receive, by the transfer gang forcing it upon and over this defective track.

If this failure and neglect of duty can, by some sort of judicial legerdemain, or legal sleight-of-hand be shifted from the master to his servants, so as to escape liability, then all duty and obligation on the part of the master is at an end, the pretended law of "master and servant" is a farce, and

the Courts ought to come out in plain language and say so, instead of trying to argue it out, in some attempted logical, plausible manner, producing the same result. This Court has held in numerous decisions, which we will cite, and the Supreme Court has held in the famous cases of *Railway Company vs. Ross*, and *Railway Company vs. Baugh*, which are familiar to this Court without special citation, that the determining characteristics, or distinguishing features, of, when an act was, or was not that of a fellow servant, so as to eliminate liability of the master, did not depend upon the rank or title of the particular individuals, but "the character of the act which the servant was performing or required to perform." Let us ask here, in all sincerity, what was the "character of the act" of placing or failing to place binders in this load of lumber, so as to make the load safe for Sundin and the gang to handle, over and upon the defective track which they were required to use? Was not this in the nature of providing a safe place, and safe instrumentalities, about which servants were required to perform their duties, and was not this a non-delegable duty of the master to so provide? How long has it been, since the Courts have been educated to the position, where they feel justified in holding now, as a matter of law, that neglect

to furnish safe instrumentalities and safe appliances, and to do work by safe methods, and failure to superintend, is the negligence of fellow servants, for which the master is not responsible? Association of individual workmen in the same lumber yard is certainly not a controlling factor. One man may be working in arm's reach of another and still be performing the duty of the master, and the other the duty of the servant. It will be contended that the cross-pieces were provided by the company, and placed somewhere "over-head" and the chain gang could get them and put them in the loads, and the neglect so to do was simply the neglect in the carrying on of the "details of the work," and is therefore negligence of fellow servants. Of course, all negligence which produces injuries, pertains to some "detail of the work." The term "details of the work" is a very much abused term. If a car repairer fails to make safe and secure repairs to a locomotive, he is negligent in the performance of some "details of the work." If the master fails to provide a safe machine, or fails to maintain it in a reasonably safe condition, this also pertains to "details of the work," but we cannot get away from the one proposition, no matter how much we spar and delve into mysterious labyrinths of legal gen-

ealogy, and that is this, the load of lumber was unsafe to be handled by Sundin in the manner in which he was required to handle it. It was the duty of the master to see that it was prepared so as to be reasonably safe, to be handled in the manner required over this defective track. The yard foreman failed and neglected to so superintend this work that the carload of lumber was rendered unsafe, and was one of the proximate causes of the death of Alex Sundin, and was one of the causes which deprived the widow and children of their husband and father, without any fault on their part or of Sundin himself. That is the net result, and that is the cause of the result, and no matter how much we speculate or conjecture, we argue ourselves back into the same position.

According to the defendant's theory and contention, all that a corporation has to do is to subscribe some of its capital stock, promote an enterprise of no matter how hazardous character, place all of the details of the enterprise in the hands of bosses, superintendents, and workmen, and then turn its back on everybody, and if some one of their men get hurt or killed, scream "fellow servant." Let us ask in all sincerity, what "original principles" of the fellow servant rule are in-

volved in this case? Was the failure to put the strips through the load, to make it secure, a spasmodic, unanticipated act on the part of the company's servants? If the foreman had exercised ordinary superintendence, could he not have observed, as the load was being constructed, that the chain gang was failing to put these strips through the load? It was simply a failure to "safely construct," in which Sundin took no part. How could Sundin have "influenced" the manner of loading these cars, or of putting the binders through the load? He had nothing to do with the loading. He had nothing to do with the load until after it was loaded, and was ordered to do something with that load. He and his gang were out in the yards, performing their line of duty, and had no opportunity to influence safe methods in the loading of cars, or anything incident thereto. If the company delegated this duty to the "chain gang" then, under the law, this gang became "the master."

The trial judge, erroneously, we think, in instructing the jury, compared the work being done by Alex Sundin, and the work being done by the chain gang, as being similar to a farmer, sending two men out in a field to load a lot of hay on a wagon, where one man pitches the hay up on the wagon, and the other man places it, forming the

load as it is built up by the joint and combined acts of the two men. In that case each man has an opportunity to see and influence just how the load is being built, and whether or not it is safe. This thought of comparison, being in the mind of the Court, is undoubtedly what led him into error in the case at bar, where the facts and circumstances, and principles of law are wholly different.

AUTHORITIES ON FELLOW SERVANT RULE AND DUTY OF SUPERIN- TENDENCE.

At the trial of the case, we cited and presented to the trial Court, the cases decided by the Washington Supreme Court, of *Dumas vs. Walville Lbr. Co.*, 64 Wash. 381; *Zintek vs. Stimpson Mill Co.*, 9 Wash. 395; and *Gaudie vs. Northern Lbr. Co.*, 34 Wash. 34.

The *Gaudie* case, *supra*, seems to be on all fours with the case at bar. Respondent received injuries while assisting in moving a car of lumber to the drying kiln of appellant. The cars were moved by men pulling and pushing them. The tracks ran in parallel directions, and there was sufficient space for one to pass safely between cars, if no protruding objects intervened with the passage. Respondent was called in from the lumber

yard to assist in moving the car. He passed in between that car and one on the adjoining track, and stationed himself alongside of the car, and began pushing the same. As the car proceeded, some protruding cross-pieces in the car of lumber caught respondent in such a manner that he was wedged between them, and he was injured thereby. It was alleged that the lumber was piled in a negligent manner, under the direction of the appellant's foreman, in that the cross-pieces projected into the space between the cars.

Appellant in its answer, pleads assumption of risk, and contributory negligence. The opinion is very instructive on the question involved in this case with reference to assumption of risk, but we intend to argue that question later in this brief. On the question of fellow servant, the Courts say:

“We think there is no question of fellow servant seriously involved in the case. It sufficiently appears that the lumber was piled under the direction of appellant's foreman, and, under his direction, respondent was called to assist in moving the car. The foreman was a vice-principal, within repeated holdings of this Court; and if the lumber was negligently piled, and if that was the proximate cause of the injury, appellant itself, and not a fellow servant, became chargeable therewith.”

The Dumas case, *supra*, was a case where lum-

ber had been negligently piled in a lumber yard of defendant. Adna Hill was yard foreman and all the men in the yard and on the docks were under his immediate direction. He had the supervision of the piling of the lumber both in the yards and on the docks. It was necessary for the plaintiff and other men to work around and upon this pile of lumber. The foreman, Hill, testified: "He did any work he was directed to do, such as piling lumber, loading cars, picking up in the yard, or whatever consisted of yard work." Hill directed the plaintiff and other men to do some work stacking lumber. They proceeded in the usual manner, when a part of the lumber pile fell off upon Dumas, injuring him. The negligence charged was that the place where respondent was ordered to work was unsafe, in that the pile of lumber on the dock was so negligently constructed, under the direction of the foreman, and presumably with his knowledge, as to make its fall imminent on any added weight. The defenses of fellow servant, contributory negligence, and assumption of risk were also interposed. The Court say:

"It is contended that the rule requiring the master to furnish a safe place to work does not only apply because 'the place to work

was being changed constantly.' It seems to us that piles of lumber impending some 12 to 16 feet directly above the place where men are required to work makes a situation well illustrating the reason and necessity of the rule. Manifestly there could have been but little change in the pile in the short time appellant and Woosen were at work. There is no evidence that either Woosen or the Japanese or any one else had so changed conditions as to make the place unsafe had the lumber been piled as the foreman, Hill, testified was usual. Nor can the defense of injury by negligence of fellow servants apply. The duty to see that the lumber was piled in such a manner as to make the place reasonably safe was a non-assignable duty of the master. The rule announced by this Court in the Zintek cases is plainly controlling on the evidence here. *Zintek v. Stimson Mill Co.*, 7 Wash. 178, 32 Pac. 997, 33 Pac. 1055; *Zintek v. Stimson Mill Co.*, 9 Wash. 395, 37 Pac. 340; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876; *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540, 34 N. E. 801; *Hennessy v. Boston*, 161 Mass. 502, 37 N. E. 668.

No evidence was offered to sustain the defense of contributory negligence other than that more properly applicable to the defense of assumption of risk. While it may be fairly said from the evidence that, if respondent had made an inspection before descending from the dock, he could have discovered that the lumber was insecurely piled, still can it be said that, under the circumstances, he assumed the risk, as a matter of law, by not making the inspection? We think not. If, in proceeding without inspection to his place beneath the dock, to which he was ordered by the foreman, he acted as a reasonably pru-

dent man receiving a like order in the same circumstances would have acted, then it cannot be held, as a matter of law, that he assumed the risk. It is true, as appellant contends, that the foreman did not specify which of the two men should go below, but he did take them to the lumber pile on the dock and did tell them to stack it on the pile bottom beneath. He says that this could only be done by one of them getting upon the pile and the other going to the ground below. This was certainly equivalent to an order to the one who did go, and respondent must be held to have acted upon a direct order from the foreman. On these facts, the question of assumption of risk was for the jury, under proper instructions. *Liedke v. Moran Bros. Co.*, 43 Wash. 428, 86 Pac. 646; *De Mase v. Oregon R. & Nav. Co.*, 40 Wash. 108, 82 Pac. 170; *Goldthorpe v. Clark-Nickerson Lum. Co.*, 31 Wash. 467, 71 Pac. 1091; *Dean v. Oregon R. & Nav. Co.*, 38 Wash. 656, 80 Pac. 842; *McGovern vs. Central Vermont R. Co.*, 123 N. Y. 280, 25 N. E. 373; *Chesson vs. Roper Lum. Co.*, 118 N. C. 59, 23 S. E. 925; *Bunker Hill & S. Min. etc. Co. v. Jones*, 130 Fed. 813."

In the *Zintek* case, *supra*, the plaintiff was injured by a pile of lumber falling on him, because it was improperly piled.

"There was evidence to show that lumber properly piled should stand by itself independent of other piles; that this particular pile had been constructed between two other piles, and that the foundation consisted of narrow strips thrown in between said two piles *without any cross-pieces*; that it was usual to have cross-pieces in the piles."

The Court, after saying that it saw nothing in the record to charge Zintek with contributory negligence, or assumption of risk, affirms the judgment for plaintiff, holding the company liable for the negligent piling of the lumber, and while the Court does not argue the question of fellow servant, it will be noted in the case, that the grounds of appeal were three; first, insufficient proof; second, contributory negligence; and third, negligence of fellow servants.

We have found another case, which is much later than those heretofore cited. *Mattson vs. Eureka Cedar Lum. Co.*, 79 Wash. 266. In this case the plaintiff, at the time of the accident, was engaged in taking bundles of lumber from trucks, as they were brought into a shed, assorting them, and leaning them against appropriate piles, when a part of the lumber fell on him, injuring him. The negligence charged was that defendant failed to furnish a safe place to work, and that it negligently caused to be piled and maintained an unsafe, unsecured, and unstable pile of lumber, *not braced*.

In passing upon the case the Court say:

“The law applicable to this state of facts is elementary. It is too well established to

require citation of authority, that there was a duty upon the part of the appellant to exercise reasonable care to furnish to the respondent a reasonably safe place in which to work. This is a positive, non-delegable duty, which carries with it the duty of reasonable inspection. It is also well established that, when a servant proceeds to work in a given environment, under a direct order from the master or the master's representative, he does not assume the risk of any dangers not so open and apparent as to be detected by ordinary observation. Applying these principles, it is clear that the questions whether the appellant had met its duty to furnish the respondent a reasonably safe place in which to work, and whether the respondent pursued the rule of reasonable prudence in proceeding to work without inspecting piles of lumber to determine the safety of the place, were, under the evidence, questions for the jury."

The Court will note in reading these Washington cases, that the liability is based upon the "failure on the part of the master through its representatives, to perform the non-delegable duty of keeping the surroundings and appliances, structures and loads of lumber in a reasonably safe condition, so that another person, called upon to perform a specific duty, ignorant of any danger, would not be subjected to a risk of which he knew nothing, and which he did not appreciate. We desire to emphasize at this point, the fact that the Washington decisions are not based upon the

“difference in rank” between the person whose duty it was to put the strips through the load, and the injured person.

The Court may see those decisions do hold specifically and point blank that the failure on the part of the master to have the piles of lumber constructed safely “was a non-delegable duty of the master.”

The decision in the Mattson case, *supra*, particularly says:

“The law applicable to this state of facts is elementary. It is too well established to require citation of authority, that there was a duty upon the part of the appellant to exercise reasonable care to furnish to the respondent a reasonably safe place in which to work. This is a positive, non-delegable duty, which carries with it the duty of reasonable inspection.”

This Court may have in mind, the fact that some years ago, the Supreme Court of Washington, in a decision, adopted the rule with reference to fellow servants announced by the Supreme Court of the United States in the case of *Milwaukee Ry. Co. v. Ross*, 28 Law Ed., U. S. Supreme Court Reports, 787, and refused to follow the rule laid down by the same Court in the case of *Baltimore & O. Ry. Co. v. Baugh*, 37 Law Ed. 772. In the

first place, we assert with the utmost confidence that the Baugh case does not over-rule the Ross case. A great many courts have been led into error in assuming that it did, probably due to a hurried reading of the opinions. The Ross case, is based upon the negligence of the conductor in failing to show the engineer of the train, his train orders, he had charge of the whole train, and represented the master, and while the orders came through the train dispatcher, by telegraph, it was the duty of the conductor to, in some manner, give the orders to the engineer, where, when, and how to operate his train, no matter where the conductor received the orders from. In other words, the conductor failed to superintend and direct the movement of the train, in a safe manner, which failure was clearly the negligence of the master, and the Court permitted a recovery.

In the Baugh case, the fireman of a light engine was injured by the negligence of an engineer, and the Baugh case distinguishes that case from the Ross case.

The controlling feature of the Baugh case was the fact that the engineer and the fireman were both fellow servants, engaged in the one enterprise of operating that engine, and no matter what

the rank of the engineer was, while he and the fireman were operating that engine, by their joint labors, they were both fellow servants. The Supreme Court of Washington, however, adopted the rule that where the manager or superintendent controlling the operations was himself negligent in the manner of carrying on his duties (*i. e.*, the duty of superintendence), that this was the negligence of the master, and the superintendent's position, his control and direction, made him the representative of the master. The Court assumed that the Baugh case was antagonistic with this principle, but in fact, it is not. However, all of the decisions of the Supreme Court of Washington have laid down and held strictly to the rule "that it was the character of the act, and not the rank of the individual" which determined the question of the master's responsibility, under the fellow servant doctrine. This is also the rule of the Federal Courts. But we do not have to rely upon Washington decisions. We have failed to find one decision announcing a contrary doctrine to that contended for by us on the question of fellow servant, under the facts in the case at bar.

The case of Louisville & N. R. Co. vs. Clark, 106 S. W. 1184 (Kentucky), is a case where coal was negligently loaded on the tender of an engine. A piece of coal fell off and injured a brakeman while

he was working in the vicinity of the tender. The Court say:

“Appellant’s counsel contends that the Court erred in permitting appellee to recover for ordinary negligence on the part of appellant’s servants who loaded the tender with coal, claiming that they were fellow servants with appellee. This precise question was thoroughly considered and determined in the case of *L. & N. R. R. Co. v. Brown*, 106 S. W. 795, the opinion in which was delivered January 9, 1908. Appellee was not in the same department of service with those who loaded the tender with coal, nor was he with them, so that he could control or advise them in the performance of their work. The case of *Gulf, C. & S. F. Co. v. Wood*, 63 S. W. 164, an opinion of the Texas Court of Civil Appeals, is like the case at bar. In that case an employe of a railroad company was injured by the falling of a lump of coal from the tender as it passed the place where he was at work, and the Court said: ‘It is not shown in the evidence what caused the piece of coal which injured appellee to fall from appellant’s passing train. According to the testimony of appellant’s trainmen, the tender was properly loaded with coal when the train started on its journey, and that in taking coal from the tender to the fire box of the engine it was carefully handled. The fact that in passing the appellee a large piece of coal fell or was thrown from the train with great force is all the evidence found in the record tending to show negligence on the part of appellant. We find, in view of the principles of law hereinafter stated, which we think are applicable to this case, that such fact is of it-

self, under the circumstances, sufficient to support the verdict of the jury in finding that appellant was guilty of the alleged negligence and that such negligence was the proximate cause of appellee's injury. There is no evidence, which, in our opinion, tends in the least to show that the appellee was guilty of contributory negligence, or that the cause of his injury was a risk assumed by him as an incident to his employment.' "

The case of Gulf, C. & S. F. Ry. Co. v. Wood, 63 S. W. (Texas) 164, is also a case where negligently loaded coal fell from a train injuring another employe, and the charge of negligence was that the coal was negligently loaded. The Court affirms judgment for plaintiff, holding the company liable for the acts of the particular servants who negligently and improperly loaded the coal.

The case of Baldwin vs. St. Louis etc. Ry. Co., 39 N. W. 508 (Iowa), was a case where lumber was negligently piled in a lumber yard. The same fell and injured another employe. It was contended there, that those who piled the lumber were fellow servants of the injured workman. The Supreme Court of Iowa say:

"Counsel for defendant insists that the evidence fails to support the verdict, and the Court below, therefore, erred in refusing to direct a verdict for defendant. This objection is based upon the claim that plaintiff, not

being engaged in the operation of the railroad, cannot recover for the negligence of a co-employee, and that the negligence, if any were shown, was of a co-employee. We think the evidence tends to show negligence on the part of the person having charge of the piling of the timber, and its care, which caused the injury. This person had full control of the timber yard, employed and discharged men, and is to be regarded as a vice-principal. He was sometimes absent from the yard, and the care and management of the business and matters were committed to or devolved on another, who took his place, and exercised the authority with which he was charged. This other person is therefore to be regarded as a temporary vice-principal in the place of his superior. The evidence tends to show negligence on the part of those persons who were in charge of the timber, and directed the manner of piling it."

We desire especially, to call the attention of the Court to the case of *Brooks vs. W. T. Joyce Co.*, 103 N. W. 91 (Iowa). This is a case where a pile of lumber fell because of the absence of cross-pieces or binders, and the Courts say:

"* * * Plaintiff, at the time of receiving the injuries complained of, was a workman employed about its yards. Under the instruction of one Brown, who had charge of the work in the yard under the direction of the defendant's superintendent, plaintiff was engaged in loading a wagon with bundles of maple flooring being taken from a pile of such lumber, and while thus engaged he was injured by bundles from the pile falling

against him and breaking his leg. The negligence charged is that the bundles of flooring were piled up without cross-pieces, which would have rendered the pile firm and secure, and which was the usual way of piling such lumber. It is claimed for the defendant that the defective piling of the lumber was the result of the negligence of a co-employee; that the danger was open and apparent to the plaintiff, and was assumed by him; and that plaintiff was guilty of contributory negligence.

The argument for appellant is largely directed to the proposition that the negligent piling of the lumber was not merely the act of a co-employee, but was chargeable to the defendant, as a failure to provide the plaintiff with a safe place to work. We are inclined to think that this contention is sound, for, if defendant allowed its piles of lumber to be so made and kept as to constitute a menace to the safety of employes, it could hardly be permitted to say that the piling was originally done by its employes, for whose negligence it would not be responsible."

In connection with this case, the Court will probably notice that the Supreme Court sustains the ruling of the lower Court, granting judgment *non obstante* on the ground that the plaintiff assumed the risk, but the facts are much stronger against the plaintiff in this case, than they are in the case at bar. In the Brooks case the plaintiff testified that if the cross-pieces had been used, that fact would have been readily apparent to him. That he went past this pile of flooring many times a

day, and had often been engaged in taking lumber from it to load upon wagons; that he could have seen, when attempting to take bundles from it, at the time of the accident whether or not cross-pieces had been used in piling it. We think the Court was justified in that case, in holding that plaintiff assumed the risk, but the case, as to original liability of the defendant, and upon the question of fellow servant is on all fours with the case at bar, sustaining appellant's contention.

We ask the Court to read the former opinion of the Court in *Baldwin vs. St. Louis etc. Ry. Co.*, 33 N. W., p. 356. This is very instructive on the question of assumption of risk, where the facts are substantially the same as in the case at bar.

The case of *Pennsylvania Ry. Co. v. La Rue* (C. C. A. 3d Circuit), 81 Fed. 148), is a case where the company failed to provide and maintain in a safe condition, standards for the holding in place of lumber on a car. The Court say:

“In the case of a low-sided gondola car employed in the transportation of lumber, side standards to keep the load in place, whether such standards are for constant use, and permanently attached to the car by chains, or are unattached and intended for use on a single occasion, are appliances necessary for

the proper equipment of the car, and as essential to the safe transportation of the load as is a proper car body."

We can see no difference between the cross-pieces which ought to have been put through the load which fell and killed Sundin, and the side stakes which are placed on a car to prevent the load from collapsing. Both strips and side stakes are used for the same purpose, and only for the purpose of keeping the load from falling off. What difference does it make whether side stakes are used or cross-pieces? The purpose is the same and if it was negligence on the part of the company, for which it was liable, to fail to provide and maintain side stakes for the purpose of keeping the lumber from falling off of the car, how can it be argued that it was not the same "character of act" in failing to provide and insert cross-pieces or binders as in the case at bar? It is a distinction without any difference, and there can be no distinction in law. Of course, we can see a possible reason for argument along the line contended for by defendant, where lumber falls off of a car because it is piled in a leaning manner, or so loosely that the least jar might shake it off, but the negligence charged in the case at bar is not the negligent manner in which the boards were placed on

the car, but failure on the part of the master to provide the necessary safety appliances to keep the load safe while being handled, and moved over a defective track by servants who are called upon to perform the particular act of moving the car.

Even the good old, conservative state of Massachusetts, whose Supreme Court laid down the original rule of "fellow servant" in this country (*Farwell vs. Ry. Co.*), agrees with our view on this question. See *Macintyre vs. Boston & M. R. R.*, 39 N. E. 1012. In this case the defendant furnished rotten and insecure stakes to hold a load of lumber on a car, which was to be moved. The stakes broke because they were rotten, and a brakeman was injured, who was assisting in moving this car. It was claimed in that case, as in the case at bar, that the master had furnished reasonably good and sufficient stakes to the servants who neglected to put sound and strong stakes in the car, and therefore, the duty of the company was ended. But the Supreme Judicial Court of Massachusetts overruled this contention and held that:

"In trusting to suitable servants the duty of furnishing suitable appliances for the work does not discharge an employer from the consequences of negligence on the part of such servants in providing safe and suitable appliances."

And that the furnishing of these stakes and placing them in the car was an act for which the master was responsible, and the fellow servant rule does not apply.

Another point in this case that we strongly urge and on which we will cite authorities, is that the master owed to Sundin the duty of superintendence, that is, the master could not turn its back on its employes, let them perform their labors in whatever manner they saw fit, without any superintendence or direction, and then claim that any injury resulting was caused by fellow servants, for which the company would not be liable.

In the case at bar there was a superintendent in charge of the work. The loading of the cars, and all other work was under the special direction of Moe, the yard foreman. Sundin had a right to assume that the manner of loading these cars would be superintended by Moe, or someone else. Sundin could not superintend it. If there had been no yard foreman, whose duty it was to superintend and keep safe the surroundings, and Sundin knew of this fact, that would be another question, but Sundin was lulled into a sense of security by the action of defendant in providing a superintendent, but one who did not superintend. He neglected to superintend, and

this certainly is the negligence of the master, because the duty of superintendence is a non-delegable duty of the master.

“The master must be held responsible for such reasonable, constant and steady supervision of his servants that they will not be permitted to become grossly or criminally negligent.” *Hill v. Big Creek Lumber Co.*, 108 La. 162, 58 L. R. A. 346, 32 So. 372.

“The master is under obligation to have a responsible representative in charge of a sawmill while it is running.” *Johnson vs. Moter Shingle Co.*, 50 Wash. 154, 96 Pac. 962.

“The duty of superintendence, whenever the work is of such a character as to require it, devolves upon the master.” *Olson vs. Erickson*, 53 Wash. 458, 102 Pac. 400.

“The business of loading a schooner with lumber cannot be carried on without supervision.” *Anderson vs. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376.

“From the nature of the work in which the men were engaged, being ordered from place to place on the work, and to do this work, which from its hazardous nature, it was the duty of the master to superintend, his obligation to superintend the work was such that he could not shift it by delegating the oversight of the workmen and the work to an employe, who in all other respects would be a fellow servant.” *Steube vs. Christopher & S. A. Iron and Foundry Co.*, 85 Mo. Appeals, 640.

See also: Note to *Engleking vs. Spokane*, 29 L. R. A. (N. S.) 481.

This is the universal holding of all of the courts, therefore, we contend on this point, that:

First: It is the duty of the master to see that these cross-pieces were put in the load before Sundin was required to move it over a defective track, the movement of which would cause a shock to the loaded car. This duty was delegated to the foreman, Moe, who neglected to perform it, but trusted and directed the chain gang to perform this particular duty. The delegation of this particular duty to the chain gang did not make the negligence in failing to perform it, the negligence of fellow servants. The duty of the master to provide these safety appliances was a continued one, and no matter how many times the duty was delegated from one servant to another, each servant represented the master in performing or failing to perform a non-delegable duty of keeping the place, work, and premises safe for other employes in Sundin's position.

This subject is treated at length in the 4th Volume of Labatt's Master and Servant, under the head of "Vice-Principalship," commencing at Sec. 1470. The author attaches numerous decisions sustaining our contention here.

We desire to call the Court's special attention

to a decision of this Court in the case of Port Blakely Mill Co. v. Garrett (Ninth Circuit), 97 Fed. 537, and numerous cases cited in support of this decision, in which it is held:

“Stakes which fit in sockets on the side of a flat car designed for transportation of lumber are appliances necessary for the proper equipment of the car, and the railroad company is not relieved from liability for personal injuries sustained by an employe by reason of the breaking of such stakes on a loaded car, where they were defective and insufficient in number, by showing that they were made and supplied by a co-servant of the person injured.”

This Court must keep in mind that these stakes are only for the purpose of keeping the load of lumber from falling off, the precise purpose for which the cross-pieces were ordinarily used, to keep the load from falling off as it did upon Sundin.

In the case of Illinois Steel Co. v. Schymanowski (Illinois), 44 N. E. 876, the Court say:

“Unquestionably it was the duty of the appellant company, when, through its foreman or superintendent or boss, it ordered appellee to work near or alongside of the pile of ore, to see to it that the pile was safe. Appellee had nothing to do with the construction of the pile, or with the loosening of its material by means of explosives. He knew nothing

about its condition. A foreman in charge of workmen, and clothed with the power of superintendence, is bound to take proper precautions for the safety of the men at work under him."

DID SUNDIN ASSUME THE RISK INCIDENT TO THE CONDITION OF THE TRACK?

The trial Court undoubtedly misconstrued or misunderstood the allegation of our complaint, which is as follows:

"That while said Axel Sundin knew of the difference in the height of said track with the said transfer car, and the necessity for violent and extraordinary movement of said car, * * * he complained to the said foreman, Ed Moe, * * * and said Moe as foreman, * * * there and then ordered him to go on and assist in moving said car, regardless of the condition of said track, which order was pre-emptorily given and said Sundin, * * * proceeded with the performance of his duties as instructed by said foreman, Moe, and did perform the duties required of him, as hereinbefore mentioned."

This is not an allegation that Sundin assumed the risk incident to the defective condition of the track. This admission of knowledge of physical conditions, is not necessarily an admission of knowledge and appreciation of risks of danger incident to physical conditions or the extent of

the danger. Of course, there are some cases where the Court will hold as a matter of law, about which no two reasonable minds could differ, that a man of ordinary intelligence must have known and appreciated a risk of danger which was clearly apparent to any reasonable man. The complaint alleges that Sundin knew of the uneven condition of the rails. In other words, he knew they were uneven. He knew that it would require some shock to a load of lumber to force it over uneven rails, but he did not know at the time of the accident, of the *extent* of the unevenness of said rails, as the undisputed evidence shows that Sundin worked on the night shift all of the previous week, and Saturday night of the previous week, when Sundin performed his last act on this track, it had only sunken three-quarters of an inch, that is, there was only three-quarters of an inch difference in the heighth of the rails; therefore, in the absence of any evidence to the contrary, the jury would have a right to assume that he did not understand or appreciate the fact that between Saturday night and Monday morning, when he took out the first load, and was hurt, the track had settled down another three-quarters of an inch, which would cause a much greater shock to a load of lumber, than was caused when he last ran a car over said

rails, and regardless of the complaint, the evidence was admitted without objection, that the rails were much lower when Sundin was killed than they were the last time he worked on them, and the evidence, having been admitted without objection, the complaint must be deemed to be modified to conform with the proof on this subject. Can Sundin be charged with having expert knowledge, of just how much shock a given condition of rails would cause a load of lumber? He had years of experience around lumber yards, doing this same class of work, but there is no evidence, that he ever before was required to work or did work, forcing loads of lumber over defective, unsafe, insecure, and settling tracks, so as to be able to appreciate and observe the amount of shock which would be caused by shoving a load of lumber over a certain condition of rails.

Assumption of risk, is at best, a mere fiction of the law. It was never intended to cover facts embraced in the case at bar, or anything similar to it. It is fundamental that a workman assumes all usual and ordinary risks, incident to the class of work which he is employed to perform, and he contracts that, in consideration of the amount of compensation he receives, he will not hold the master liable for injuries resulting from those con-

ditions. Can it be assumed that Sundin ever contracted, either expressly or impliedly, for the mere wage of \$3 per day, that he would not hold the master responsible for injuries occasioned by its negligence to perform its positive, legal and humane duty? To allow defendant to escape liability in cases of this kind would be offering a reward for negligence in not maintaining and keeping reasonably safe, conditions and appliances, about and upon which men are required to labor for corporations. What inducement is there for the corporation to go to the extra expense of keeping up its track repairing, and maintaining safely its appliances, or employing competent and cautious fellow servants, or hiring superintendents, if it can never be held liable for its failure so to do? The testimony also shows that this car of lumber was 48 inches wide. The track was only 24 inches wide. Was Sundin supposed to crawl down under the car and see how much the track had been permitted to sink during the 48 hours of time, he had been absent, so as to know and appreciate every risk and characteristic incident to this track; to figure out, analyze, and reason out the result of the laws of Physics, and appreciate and understand, not only all of the physical facts, but the law of forces, so as to determine whether or not there

was risk in performing the duty which he was attempting to perform and was ordered to perform in the interest of his masters?

Another circumstance the jury would have a right to consider is this: Sundin had a wife and three children. He must have known and appreciated, that if he was injured or killed, it meant not only pain and suffering to him, but incalculable pain and suffering to his wife and little ones. Would he have placed himself alongside of this car, and performed the duty which he was performing, if he had the slightest thought or appreciation of this load toppling off upon him? We think not, and the jury has a right to consider this circumstance as well as all others. It was shown by the evidence that he was a careful, considerate father and husband. It is not shown that he was given to recklessness, or the incurring of danger.

DID SUNDIN ASSUME THE RISK RESULTING FROM THE DEFECTIVE CONDITION OF THE RAILS, CONCURRING WITH THE UNSAFE CONDITION OF THE LOAD OF LUMBER ON ACCOUNT OF THE ABSENCE OF CROSS-PIECES OR BINDERS,

BOTH OF WHICH CONDITIONS CONTRIBUTED TO PRODUCING HIS DEATH?

It is a well known and elementary proposition of law that "the negligence of the master concurring with that of a fellow servant of the injured employe, producing the injury, renders the master liable for such injuries." This Court has enunciated this principle so many times that it is useless to cite authorities and we apprehend defendant will not argue to the contrary. Assumption of risk, as stated before, is based upon the theory of the law, that an employe contracts to assume certain risks for extra compensation, and also if certain dangerous conditions develop during his work, of which he has knowledge, and the danger of working in connection therewith, which he appreciates and understands, he will be deemed to have consented to continue his work, notwithstanding said developed dangerous conditions, but the elements essentially necessary, which must exist in order to charge the employe with "assumption of risk," are, first: The dangerous conditions must exist; second, The employe must not only know of the physical existence of certain conditions, but it must be shown that a reasonable man, situated as he was, must have appreciated and reasoned out from cause to effect, the danger and ex-

tent of the danger of said conditions; third, The employe *must have knowledge of all of the conditions which may produce an injury*. Mere knowledge of one condition and ignorance of the other, would not charge him with assumption of risk; fourth, It must be shown conclusively that the employe, having knowledge of the physical conditions and realizing and appreciating the results which ought to be expected in performing his labor, under said conditions, voluntarily incurred the risk which was open and apparent, threatening and imminent.

This Court has enunciated these principles dozens of times, and in conformity with the decisions of the Supreme Court and all other courts on the question of assumption of risk. The record is absolutely barren of any incident or circumstance from which the inference could be drawn that Sundin knew of the absence of the cross-pieces or binders from the load which fell over on him. From the most favorable standpoint to defendant this was at least a question for the jury, who would have a right to consider Sundin's opportunity for observation, the time in which he was required to perform the act, of moving the car of lumber, 3 minutes, and numerous other circumstances from which they could reason out

whether or not Sundin ought to have had knowledge of these conditions. It certainly cannot be decided as a question of law. Therefore, we contend, it not being proven conclusively, that Sundin knew of the absence of the cross-pieces and appreciated the unstable and dangerous condition of the load occasioned thereby, and considering all of the evidence from the most favorable standpoint to the deceased, and plaintiffs herein, it must be assumed that he was wholly ignorant of the fact that the usual customs, and orders, had not been carried out, in loading this load of lumber, and ignorant of the neglect of duty on the part of the yard foreman in failing to superintend and see to it that said load of lumber was loaded in the usual and ordinary safe manner.

We then have total absence of knowledge on the part of Sundin of a hidden and concealed danger, which was one of the contributing causes to the accident. Is this Court going to charge Sundin with assumption of a risk of which he was totally ignorant, and of which he could not be presumed to have been advised? If so, then this is extending the rule of "assumption of risk" far beyond that of any other appellate court in the history of the law of master and servant.

Counsel for defendant will argue that the testimony shows that the absence of the cross-pieces from the load was clearly apparent, and that any one could see the conditions by a mere glance, or by casual observation. We assert that the testimony of Egstrom and Brewstead is directly to the contrary. Sundin is dead, and the law will presume that he used ordinary care. This presumption is in the nature of evidence. We ask in all sincerity, was it incumbent upon Sundin, in the few seconds of time, within which he had to act, to make inquiries as to whether or not the load of lumber had been loaded in the usual and ordinary manner, and according to orders, before he would perform the express command of the yard foreman? Was he required, in the exercise of reasonable care, to make a minute inspection of the load, to see whether or not cross-pieces had been put therein? It will be noted that *a part of the load had not yet emerged from between other loads*, out of which it was being propelled, and if there had been cross-pieces in this concealed end of the load, he could not have seen them, and he had a right to presume they were there, even though he did not observe any in the middle of the load. He was required to catch the car "on the fly"; that is, grab hold with his back to it,

and exert his strength shoving the car along to the transfer car, after the car had been started. His mind was necessarily absorbed in attempting to move this heavy car of lumber. We ask again, would he not have a legal right to assume that the yard foreman had performed his duty of superintendence, and had seen to it that the car of lumber was loaded as the rules required it to be, and that the same was safe to be handled, in the manner in which he was required to handle it, and over a track which had been provided by the company, and permitted to exist in the condition which it was in?

We strenuously urge that the questions of assumption of risk, and contributory negligence were questions of fact for the jury. The evidence conclusively shows that Sundin's death was produced by the negligence of defendant, concurring with that of fellow servants, even should this Court disregard the cases cited by us and hold, that, failure to load the lumber properly and safely was the negligence of fellow servants, instead of that of the master.

This Court has often had occasion to consider the law of assumption of risk in cases of this kind, and we will not burden the Court with the hun-

dreds of authorities on this question. We have but to cite the decisions of this Court to demonstrate beyond question that the trial Court was wrong in directing a verdict, and holding as a matter of law, that Sundin assumed the risk of the situation, surroundings and conditions, which produced his death. See the case of *Williams vs. Bunker Hill & Sullivan M. etc. Co.*, October 7th, 1912, Ninth Circuit, 200 Fed. 211.

Here the plaintiff came in contact with a highly charged electric wire. He knew there was some danger, knew it was charged with electricity, knew it was unguarded, and rode in and out of the mine daily on cars propelled by electricity. He worked within a few feet of the wire. He saw the car started and stopped by the power of the electric current, and knew it conducted sufficient electricity to propel the cars. He knew he would be "stung" if he came into contact with it. The Court say:

"But the risk of the mining company's negligence and of its effect were not of the ordinary risks of Williams' employment, unless such negligence or the effect thereof was known and appreciated by him, or was obvious."

Assuming now, that the jury had found, had they been permitted to do so, that Sundin did

not know of the absence of the cross-pieces from the load, and there is certainly sufficient evidence to justify a jury in so finding, even the trial judge does not presume to find this fact against plaintiffs, how could Sundin appreciate the risk of the load collapsing, which collapse was produced by both condition, to-wit: Failure to put cross-pieces or binders through the load, and the defective condition of the track. We must bear in mind that in order to charge assumption of risk, he must either know of both of these conditions, which contributed to causing the collapsing of the load, or they must have been so apparent that he must be presumed, as a matter of law, to have had actual knowledge, and appreciated the risk incident to both conditions.

Quoting again from the Williams case, *supra*, the Court say:

“But the knowledge does not necessarily lead to the conclusion that results of such contact are appreciated.”

We say, as the Court said in the Williams case in substance: Can it be said, that a man, unskilled in the use of handling cars, *over defective tracks*, and with loads that are not loaded by the ordinary methods, ought to comprehend or appreciate the danger incident to two causes, one of

which he is ignorant, and the other of which he has knowledge of the physical conditions, with no experience in operating cars over defective tracks, all of which is due to the master's negligence?

This Court further says in the Williams case, *supra*:

“The distinctions sometimes drawn between knowledge of danger and appreciation of risk are not confusing, when we consider that knowledge really means such an understanding of the peril as carries with it an appreciation of the danger. We might say here that there was knowledge of danger, yet no actual appreciation of the risk to which Williams was exposed; that is, he knew of danger by the exposed wire, but he did not know of the risk of his act in touching it with a hose in his hand—in other words, he did not appreciate the peril that surrounded him.”

We think the trial Court committed the very error which this Court referred to in the above quotation. The judge confused the fact, of knowledge of “physical conditions,” with knowledge and appreciation of the risk incident to the surroundings. This Court, quoting from *Chicago, B. & Q. R. Co. v. Shalstrom*, 195 Fed. 725, say:

“Assumption of risk rests upon the maxim, *Volenti non fit injuria*,’ and upon the contract of employment. It rests upon the prin-

ciple that no legal injury can be inflicted upon one who willingly assumes the known or obvious risk of it, and hence it includes the risk of known or obvious defects and dangers which the master or the foreman directs the servant to incur during the employment; for the latter is as free to decline to obey such an order as he is to decline to take or to continue in the employment and where he knows and appreciates the danger as well as the master or the foreman, he becomes subject to the maxim, 'Upon the willing no legal injury can be inflicted.' The order or direction of the master, or of the foreman, to the servant to work at a specified place, or with certain appliances, does not release the servant from his assumption of the apparent risks and dangers of defects in the place, structure, or appliances that are known to him, or are 'so patent as to be readily observed by the reasonable use of his senses, having in view his age, intelligence, and experience.' *Railroad Co. v. Jones*, 95 U. S. 439 (24 Law Ed. 506). * * *."

Can it be said that Sundin willingly assumed the risk of a load of lumber falling upon him, due to not being properly secured, bound and protected when he was totally ignorant of that fact?

This Court also quotes with approval, *National Steel Co. v. Nore*, 155 Fed. 62, in which Judge Lurton, while judge of the 6th Circuit, uses the following language:

"To defeat an action by the defense of assumption of risk, the employer must show, not

only that the servant knew of the negligence of which he complains, but that he knew and understood, or ought to have known and appreciated, the increased danger to which he voluntarily exposed himself. There is a distinction between knowledge of defects or knowledge of alleged negligent acts, and knowledge of the risks resulting from such defects or acts. In Cooley on Torts (3d Ed.) 1048, the rule is stated in these words: 'It is essential to the assumption of risk, not only that the servant shall know the defect out of which the danger arises, but that he should appreciate the danger, or that the danger should be manifest to a man of ordinary intelligence and experience in the line of work in which the servant is engaged.'

We ask the Court to consider the numerous cases cited in the Williams case, *supra*, without burdening the Court by especially citing them herein.

The case of Bunker Hill & Sullivan M. etc. Co. v. Jones (9th Circuit), 130 Fed. 813, is another opinion of this Court, citing numerous authorities, upholding our contention on this question.

We call the Court's attention especially to Puget Sound Ry. Co. vs. Harrigan (9th Circuit), 176 Fed. 488, where this Court say:

"Of course, it is a matter of common knowledge that there is always more or less personal risk in the occupation of a railroad em-

ploye. In accepting his employment, the plaintiff assumed all the ordinary and usual risks incident thereto, not only those which he knew, but those which he might, in the exercise of reasonable care, have discerned. But he assumed such risks with the recognized qualifications, one of which is that the employer shall use usual care to obviate or at least minimize the danger, and he did not assume the risk of latent defects, notwithstanding that his opportunity of discovering them was the same as that of his employer. He did not assume the risks arising from his employer's negligence, which were not incidental to the business, when he had no actual knowledge of the same. *Union Pacific Ry. Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766; *Texas & Pacific Ry. Co. v. Archibald*, 1700 U. S. 655, 18 Sup. Ct. 777, 42 L. Ed. 1188."

One of the most instructive cases on this question, and one which has collated a large number of authorities is the case of *N. Y., N. H. & H. Ry. Co. vs. Vizvari* (2nd Circuit), 210 Fed. 118. This decision has to do with the claim of assumption of risk and also contributory negligence.

This Court must keep in mind the fact that Sundin was ordered to do the very thing which he was doing when he got killed. He was acting under the express command of the master's representative Moe, the yard foreman, and all of the courts and authorities are very loath to charge an

employee with assumption of risk of an injury resulting from obeying the express command of the master. The Supreme Court of Washington in *Hull vs. Davenport*, 93 Wash. 16, decided Dec. 1916, in a very able opinion written by Mr. Justice Ellis, clearly supports this Court, and also our contention, wherein it is said:

“Respondents contend that, even assuming that the question of primary negligence was one for the jury, appellant in any event assumed the risk of injury in using the elevator. It is argued that all of the obvious risks, even those of extraordinary danger resulting from the negligence of the master to perform a positive duty, are, as a matter of law, assumed by a servant in the absence of a complaint to the master and a promise on the master’s part to remove the danger. The rule thus broadly stated without qualification is not the law. In the case before us, there was a standing order posted at the entrance to the elevator: ‘Use the elevator.’ In addition to this, there was evidence that the employees had been specifically directed to use it. True, the sign may not have been there that morning, but the order it conveyed had never been countermanded. It is only where the danger of the act which the servant undertakes is not only open, patent and obvious alike to man and master and equally appreciated by both, but it is plain that a reasonably prudent man would not undertake the act at all, that the servant assumes the risk in obeying the master’s order. The rule is thus tersely stated by the Supreme Court of Ohio:

“The clear result of the best considered cases is, that where an order is given a servant by his superior to do something within his employment, apparently dangerous, and, in obeying, is injured from the culpable fault of the master, he may recover, unless obedience to the order involved such obvious danger that no man of ordinary prudence would have obeyed it; and this is a question of fact for the jury to determine under proper instructions, and not of law for the Court.” *Van Duzen Gas Etc. Co. v. Schelies*, 61 Ohio St. 298, 309.

See, also, *Waterman v. Skokomish Timber Co.*, 65 Wash. 234, 118 Pac. 36; *Williams v. Spokane*, 73 Wash. 237, 131 Pac. 833; *Rogers v. Valk*, 72 Wash. 579, 131 Pac. 231.

But it may be insisted that the sign was not an order. If it was not, the query arises, what was it there for? It is not claimed that this elevator was used or intended to be used by the public. It was almost wholly used by employees such as appellant. The doctrine of assumption of risk, whether assumed to be founded in the fiction of an implied contract with pay commensurate with the danger, or whether it be referred to the maxim, *Volenti non fit injuria* (3 Labatt, Master and Servant, 2 Ed., Sec. 1285), *is artificial and harsh at best. It should not be extended beyond its reasonable limits.* It must be remembered that the plan of the establishment and the coordination of work is that of the master, deliberately adopted without consulting the servant. In adopting the plan, the master must be assumed to have considered it with a maturity and deliberation not possible to the servant absorbed

in the details of his daily duties. Whenever, therefore, there is room for reasonable difference of opinion as to whether the servant so appreciated the danger as to make it reckless to proceed, the question is one for the jury, especially where the servant is proceeding under an order of any kind, however communicated. As said by this Court in *Bailey v. Mukilteo Lumber Co.*, 44 Wash. 581; 87 Pac. 819:

“Any other theory in law would be harsh and unjust. Hence, the courts generally have decided that the servant will not be charged with assuming the risk of a place unless the peril is so apparent that there could be no conflicting opinion between men of ordinary prudence and understanding; and when this appears plainly, and then only, it becomes the duty of the Court to hold that as a matter of law the risk was assumed.”

In the case of *Illinois Steel Co. v. Schymanowsky*, heretofore referred to, 44 N. E. 876, on the question of assumption of risk and contributory negligence, the Court say:

“Undoubtedly the general rule is that an employe who continues in the service of his employer after notice of a defect augmenting the danger of the service, assumes the risk as increased by the defect. But this rule is subject to qualification. In the first place, there is a distinction between knowledge of defects and knowledge of the risks resulting from such defects. The servant is not chargeable with contributory negligence if he knows that defects exist, but does not know, or cannot know by the exercise of ordinary prudence,

that risks exist, *Cook v. Railway Co.*, 34 Minn. 45, 24 N. W. 311; *Coal Co. v. Haenni*, 35 N. E. 162. Appellee's knowledge of the fact that the light was not sufficient for work on a dark and stormy night did not indicate that he knew of the unsafe condition of the pile of ore, and of the risk in working near it. In the next place, a master is liable to a servant when he orders the latter to perform a dangerous work, unless the danger is so imminent that no man of ordinary prudence would incur it. Even if the servant has some knowledge of attendant danger, his right of recovery will not be defeated if, in obeying the order, he acts with the degree of prudence which an ordinarily prudent man would exercise under the circumstances. When the master orders the servant to perform his work, the latter has a right to assume that the former, with his superior knowledge of the facts, would not expose him to unnecessary perils. The servant has a right to rest upon the assurance that there is no danger, which is implied by such an order. The master and servant are not altogether upon a footing or equality. The primary duty of the latter is obedience, and he cannot be charged with negligence in obeying an order of the master unless he acts recklessly in so obeying. Whether he acted thus recklessly in obeying his master's order, or whether he acted as a reasonably prudent person should act, are questions of fact to be determined by the jury. *Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572; *Syrup Co. v. Carlson*, 145 Ill. 210, 40 N. E. 492; *Railroad Co. v. Leathers*, 40 N. E. 1094. These questions of fact are settled in this case by the judgment of the Appellate Court affirming that of the Trial Court."

Inasmuch as this accident happened in the State of Idaho, we desire to call the Court's attention to the decision of the Supreme Court of that state in the case of Knauff vs. Dover Lbr. Co., 120 Pac. 157. Reading the last five lines of page 160 and two-thirds of page 161, which is the argument of the Court on the question here presented, the Court approves of an instruction given by the Trial Court, as follows:

“The plaintiff had a right to assume and rely and act upon the presumption that the defendant had used reasonable care in furnishing a reasonably safe floor and bed of the slasher upon which he was required to pass in the duties of his employment, if he was so required to pass, and that plaintiff was not required to search or inspect such floor for defects therein that were not obvious or apparent. He had only to exercise the care that an ordinary prudent person would have exercised under like circumstances.”

We do not desire to burden the Court unnecessarily by and further extended argument on these questions, and while we greatly admire, honor, and respect the ability, fairness and profound desire to do justice, which is always exhibited by the honorable judge who tried this case, nevertheless, we feel that he has fallen into error in holding, first, that the negligent manner in which the load of lumber was loaded, and the failure to insert cross-

pieces or binders in the load, or to adopt some other efficacious method to make the load safe while being transported over the defective tracks which defendant elected to use, was the negligence of fellow servants, and also in holding, as a matter of law, that Sundin assumed the risk of losing his life or of being injured by the conditions which produced his death.

We think that even if this Court should disregard all of the authorities which we have cited herein, and hold that the negligence in failing to properly safeguard the load by the use of the ordinary cross-pieces and binders, was the negligence of fellow servants for which defendant is not responsible, in any event, this Court must reverse the judgment of the Lower Court and permit a jury to pass upon the question of whether or not Sundin assumed the risk incident to the surrounding conditions, of which he was ignorant, and also whether or not he assumed the risk incident to the negligence of the master, concurring with that of fellow servants, which negligence produced Sundin's death.

We cannot see how this Court can reconcile its former decisions on the question of assumption of risk, with a decision of affirmance in the case

at bar. It would certainly take a very ingenious and analytical mind to convince any lawyer or layman of the distinction. We are mindful of the desire on the part of this Court to follow precedents, and we know that the Federal courts are what is termed "very strong" on the fellow servant doctrine. The people, from constant reading of the decisions of the Courts, which made up the common law, have become thoroughly convinced of the injustice of a great many of the decisions, and feel that the Courts, from time to time, vied with each other in extending the fellow servant rule beyond just and reasonable limits, always in the interest of the master, and against the servant; therefore, a great many of the states have abolished the fellow servant rule altogether, and even the Federal Congress has gone a long ways in that direction, in passing the Federal Employer's Liability Act.

DEFENDANT CLAIMS THAT SUNDIN WAS WARNED NOT TO WORK ON THE SIDE OF THE CAR.

It will be contended by defendant that the evidence conclusively shows that Sundin was warned by the yard foreman not to assist in moving a car,

by standing along the side, but the evidence will not bear out this contention.

We quote from the testimony of the yard foreman, Andrew Moe (Tr.):

“THE COURT: Is it customary for men to take hold of the side of the car in the manner suggested by counsel, by putting their backs against it, and moving it this way?

A. They do sometimes.

THE COURT: They do sometimes?

A. Yes.

THE COURT: You may proceed.”

And again on page, Tr.:

“Q. Mr. Moe, assuming that there are three men behind shoving, and no room for any more, where does the fourth man, if he does help, shove the car out, take hold of the car ordinarily, according to the custom in vogue?

THE COURT: No. Mr. Moe, is it customary for men who operate those cars to get hold of them on the side or not?

A. It is customary part of the time.

MR. PLUMMER: Now again, when the man takes hold as the Court has referred to in his question, with his back to it, when does he take hold of the car?

THE COURT: In that way. Where is the

car, in what position is it when he takes hold in that way?

A. It has got to be outside of the other loads. He can't get in and get hold of it between the loads."

Again we quote from page..... of the record, from the testimony of the yard foreman, Andrew Moe:

"Q. And when those cars were moved, when there was a heavy load, for instance, and there was three men on the end shoving, where was it customary and usual for the other man who had to help, to have hold of the car?

A. Any place that he could get hold of it.

MR. PLUMMER: Q. State what the fact was before Mr. Sundin's death, if it was frequently the custom for men to get hold of the car like that (illustrating), with his back to it?

A. It was, sometimes.

Q. And did you do that yourself, sometimes?

A. Yes."

Without quoting at length, we will suggest that the testimony of witnesses Brewstead and Egstrom shows conclusively that the load was being moved at the time Sundin was injured, in the usual and

customary manner, by Sundin assisting from the side of the load.

Now, as to warning which it was claimed was given Sundin, the testimony simply shows that he and others were warned not to shove from the side of the car "when it looked dangerous."

WITNESS ANDREW MOE

"MR. NELSON: Q. Is it not a fact, Mr. Moe, that on several occasions you warned the deceased Alex Sundin to keep away from the side of the load

A. I warned them all, I believe, numbers of times."

On re-direct examination, he testified as follows:

"By MR. PLUMMER:

Q. Mr. Moe, counsel asked you about warning the men, and you answered that you warned all of them. Now, in warning them, what did you say, what was your expression that you used?

A. Oh, if I see a load that I thought wasn't quite safe, I said, 'Boys, keep away from that side,' whichever side I might think was unsafe. I dont that lots of times.

Q. And that is what you meant when you answered his question?

A. That is what I meant.

Q. Do you recall of any time having warned Sundin, himself?

A. I don't know if I exactly warned him individually, but there were always three together, and I would talk so that they would all hear it.

THE COURT: I want to ask the witness a question. You spoke of warning these men from time to time as you saw that a load didn't seem to be quite safe. Is that more or less of a common thing, that a load wouldn't be quite safe?

A. Yes, sir, so far as I have seen in the lumber yards, it is a common thing that there are some loads that are not safe.

THE COURT: Why wouldn't they be safe? I mean, what would be the reason for the peril? Can you give us an illustration?

A. Well, sometimes the chainers don't pay close enough attention to loading it straight and nice, and sometimes there will be a rush, a little bit for a few minutes, and they wouldn't place them exactly the way they should, and lots of reasons, and once in a while there will be a load that isn't safe." (See Tr., p.....)

The Court will observe, after reading this testimony, that never at any time, as shown by the record, did Sundin have knowledge of any habit or frequency of neglect in leaving out the strips or binders which held the loads together. All of the warnings which were given him, were, as testi-

fied to by Moe, where loads were improperly loaded or leaned to one side or the other, and it was only when the load "looked dangerous" that the men were not supposed to work alongside of the car.

We might further suggest, in conclusion on this point, that any testimony given by Andrew Moe, who was himself the negligent foreman, is not conclusive. Sundin is dead, and cannot dispute him, and the Supreme Court, as well as this Court, has frequently held that the testimony of an interested witness, although undisputed, is not conclusive. The jury have a right to consider his interest from every standpoint, and to weigh his evidence like any other evidence.

How can it be shown that this particular load of lumber "looked dangerous" to Sundin, who had suddenly been ordered to move this car, when he had not seen it loaded? He could not even tell from where he stood, what sort of lumber was on the car, whether wide boards or narrow boards.

Mr. Moe, the yard foreman, testified that where the boards were wide, they would sometimes only put in two cross-pieces or binders, as that would be sufficient; but where the lumber was of the character of that which fell in this case, being 1x6x16,

they would usually put in 6 cross-pieces or binders. How could Sundin tell that this was 6-inch lumber? The Court must understand that Sundin was standing on the ground when he took hold of the side of the car. The car itself was two feet high from the rails; then we have 55 or 60 boards, one inch in height, which would be approximately a distance of seven feet from the level of the ground to the top of the load. Assuming that Sundin was a man of ordinary height, he could not see on the top of the load at all, therefore, he would not know whether the load consisted of 6-inch boards with 6 binders, or wide boards with only two binders, and these binders or cross-pieces, being simply lath, could be so placed that one was diagonally across the front of the load, and another across the rear, which rear part had not yet emerged from between other loads.

We say emphatically, and earnestly, that to hold Sundin guilty of contributory negligence, or to charge him with assumption of risk of the injury which he received, under the facts in this case, is a gross miscarriage of justice, and is certainly adding insult to injury to permit the master to escape all responsibility for the gross and inexcusable neglect of failing to observe, through its proper officers and yard foreman, how the men

were conducting their work, whether in a safe or dangerous manner, where others were required to follow them in other work, and also to permit and require the use of tracks which are wholly unsafe and out of repair, as is shown by this record.

The two combining negligent conditions causing the death of a loving husband and father, making a widow of the wife, and orphans of the children. Such holdings and rulings do more in the opinion of the writer to cause anarchy and revolt among workmen, than any other one factor. Under the circumstances in this case, presenting the same as a picture, there is not one layman in 10,000 but who would say that this widow and these children ought to recover in this case; that the defendant was grossly negligent in both particulars, and this negligence caused Sundin's death. The courts may be able to educate the lay mind so as to eliminate this opinion, but it will be a hard struggle, and pulling against the tide, because such a holding and ruling does not possess the slightest characteristic of justice.

ERROR IN EXCLUSION AND ADMISSION OF EVIDENCE.

As we are convinced this Court will grant a new trial, we ask the Court to rule and pass upon

certain matters of evidence, the admission and exclusion of which, by the Court, is assigned as error.

Referring to page of the Transcript, the Court permitted defendant to propound to Andrew Moe, a witness for plaintiffs, the following question on cross examination:

“Q. Mr. Moe, when a man of ordinary experience in handling lumber or trucks of lumber is at the side of one of those trucks of lumber such as the one complained of in this case, can he tell by casual observation of that load of lumber whether or not there are any cross pieces in the load?

MR. PLUMMER: We object to that as not cross examination, and it is a part of their defense, if Your Honor please.

THE COURT: Overruled.”

The same question was put thereafter to the same witness in different form, and the Court permitted the same to be answered. The plaintiff objecting, also on the ground that the question simply called for a conclusion of the witness. The admission of this question and other questions of the same character, to this witness, seems to us was error. In the first place, it was not cross examination. The plaintiffs did not ask Mr. Moe a single question on that subject, and it simply called for a conclusion of the witness, which we

insist was not proper for the reason that the jury are the ones to draw the conclusion when it hears and understands all of the facts. To permit the witness to testify that Sundin *could* have seen the absence of the strips, or did see them, or ought to have seen them, is practically permitting the witness to decide the very question which the jury is called upon to decide.

The Court will see from the record that we argued the question before the Court, but that it was over-ruled in every particular.

The Court erred in making the following statement in the presence of the jury, in response to an objection of counsel for plaintiffs, as follows:

“RE-CROSS EXAMINATION.

“By MR. NELSON:

Q. Mr. Moe, do you know whether or not it is customary for a man to place his back up against a load fifty tiers high, in which there were no cross-pieces, that was being moved down onto the transfer track? Would that be customary under your observation during your time there as foreman?

MR. PLUMMER: If Your Honor please, I object to that on the ground that it isn't shown so far that it was customary to have cars without the pieces in them. Therefore, it wouldn't be proper cross examination.

THE COURT: No, it isn't shown, nor is it shown that it was customary for men to take hold of a car in this way. He said it was sometimes done. He also stated that they weren't supposed to do it."

Thus, the Court will see the trial judge practically told the jury what weight should be given to the evidence on this subject. The testimony of Moe was, up to this time, as follows:

"THE COURT: No. Mr. Moe, is it customary for men who operate those cars to get hold of them on the side or not?

A. It is customary part of the time. (P., Tr.)"

(Again, a question by the Court):

"THE COURT: Is it customary for men to take hold of the side of the car in the manner suggested by counsel, by putting their backs against it, and moving it this way?

A. They do sometimes.

THE COURT: They do sometimes?

A. Yes.

THE COURT: You may proceed.

MR. PLUMMER: Q. Now again, when the man takes hold as the Court has referred to in his question, with his back to it, when does he take hold of the car?

THE COURT: In that way. Where is the car, in what position is it *when he takes hold in that way?*

A. It has got to be outside of the other loads. He can't get in and get hold of it between the loads." (Tr., p.....)

This Court will observe, in the face of this evidence, the Court practically told the jury there was no evidence that it was customary for the men to take hold of the car in this way, that is, along the side of it. The Court also said that Moe testified that the men were not supposed to take hold of it in this way.

The testimony of Moe, when he said the men were not supposed to go *alongside of it*, refers to when the car is started from between the other loaded cars, and following that answer, counsel for plaintiff attempted to show by this witness, that when there were four men, one of them must wait until the car emerges from between the other loads, and then take hold of the side; but the Court argued and ruled out plaintiffs' questions on the ground that they were leading, when no objection had been interposed by defendant.

We think this observation of the Court was wholly outside of the scope of reasonable comment, and very prejudicial, and should not occur at another trial.

The transcript of the record, at pages....., show the following:

‘Q. Referring to the ends of these short tracks upon which the car was going that you and your gang was pushing on the day that Mr. Sundin was killed,—I am referring now to the ends of these short tracks—how were the ends of those rails kept with reference to the rails on the flat car that you have described, ordinarily kept?

MR. NEUSON: If Your Honor please, we object to that as irrelevant, incompetent, and immaterial, and not within the issues in this case.

THE COURT: Sustained.

MR. PLUMMER: Does Your Honor hold that we can't show the condition of the tracks? I will state, if Your Honor please, that in offering that, we are charging the defendant here with negligence in maintaining a track in a defective condition. The mere showing of the existence of a condition isn't showing negligence unless you show that it is an abnormal condition or a condition that doesn't ordinarily exist or is not in an ordinary form. We want to show how it was usually kept, whether on a level or otherwise, and then show the condition this particular track was in at the time the accident happened, which makes the connection, showing negligence. It is absolutely essential, it seems to me.

THE COURT: The only difficulty about that is that you haven't alleged what the usual

manner was, and you have alleged that the deceased knew of this condition.

MR. PLUMMER: I am afraid the Court is probably confounding assumption of risk is one proposition, and negligence of the master is another. First we have got to show the negligence of the master.

THE COURT: Yes, but have you alleged anything about the other tracks?

MR. PLUMMER: I have alleged that they negligently permitted them to sink down lower than was safe.

THE COURT: Then why is it material to know how the other tracks were?

MR. PLUMMER: For the purpose of comparison.

THE COURT: The objection is sustained.

MR. PLUMMER: Plaintiff's offer to show by this witness that all of the other tracks which run parallel to the track upon which the car was running that caused the injury to the deceased were ordinarily and usually kept and maintained on a level with the cross tracks on the transfer car, upon which transfer car the deceased and his co-employees were attempting to place the loaded car of lumber, and that on that particular track that this car of lumber was being shoved over, the ends thereof were allowed by the defendant to get in a condition—

THE COURT: That is another question.

MR. PLUMMER: All right, then. Just the first part is what I will offer. For the purpose of showin, or at least showing circumstances tending to prove negligence on the part of the defendant in maintaining and permitting the track to be in the condition it was in at the time he was injured.

THE COURT: The offer is denied, for the reason that there is no averment in the complaint charging that the other tracks were kept in any particular condition, or that the deceased knew of any such condition."

Here we attempt to show negligence on the part of the company in the condition in which the track were maintained, and for that purpose, and by way of comparison, for the benefit of the jury, we attempted to show that these short tracks were ordinarily maintained on a level with the tracks on the transfer car, so that the ends of the tracks would match, and no shock would be occasioned in running a car over the joint. We showed that it was allowed to sink and settle a distance of an inch and a half. This offer of evidence was excluded by the Court on the ground suggested by the Court that it had not been pleaded in our complaint. Of course, no such suggestion or objection was interposed by the defendant. The complaint alleges negligence in the maintenance of these tracks, and describes in what respect

these tracks were out of repair, and in a dangerous condition. The jury might infer, without any evidence, that it was customary and usual to have all of the tracks an inch or two lower than the tracks on the transfer car. Again, this evidence was important to plaintiffs as showing that Sundin had had no previous experience in operating cars over that sort of tracks, and therefore, did not appreciate nor understand the amount of shocks which would be caused to the car of lumber in forcing it over the tracks in that condition. The fact that he was an experienced man, operating cars over level tracks, would not be a circumstance to show that he appreciated or understood what might happen by running a car of lumber over tracks which, the last time he saw them, previous to the injury, were only $\frac{3}{4}$ of an inch lower than the other tracks, but when he was injured, it had settled to an inch and a half lower, and we insist and assert with confidence that it was neither proper nor necessary to plead this evidence, that is, that the other tracks were ordinarily maintained on the level.

It is a rule of pleading that we must state the ultimate fact, that is, the negligence and unsafe condition of the track, and the particulars of its unsafety. This evidence goes to prove the un-

safety of it. Just the same as proving the defective appliances of any sort. It is customary and usual to permit evidence to show what customs prevail generally in the carrying on of like work.

This is not a matter of pleading, it is a matter of evidence, and we think the evidence should have been admitted, and for the purpose of this case, on this Writ of Error, the Court must assume that ^{which} ~~what~~ we offered to prove, ^{as} ~~after~~ showing the negligent condition of the tracks, otherwise, we would be deprived of a right to have this point reviewed at all.

We respectfully submit that the judgment in this case should be reversed, and a new trial ordered.

PLUMMER & LAVIN,

Spokane, Washington,

BLACK & WERNETTE,

Coeur d'Alene, Idaho,

Attorneys for Plaintiffs.

**United States Circuit Court
of Appeals**

3

FOR THE NINTH CIRCUIT.

OLGA SUNDIN, and MARGUERETTE SUNDIN, IVER SUNDIN, and EUGENE SUNDIN, Minors, by OLGA SUNDIN, Their Guardian *Ad Litem*,

Plaintiffs in Error.

vs.

EDWARD RUTLEDGE TIMBER COMPANY, a Corporation

Defendant in Error.

Brief of the Defendant in Error

Upon Writ of Error From the United States District Court for the District of Idaho, Northern Division.

RALPH S. NELSON,
Coeur d'Alene, Idaho.
Attorney for Defendant in Error.

No.....

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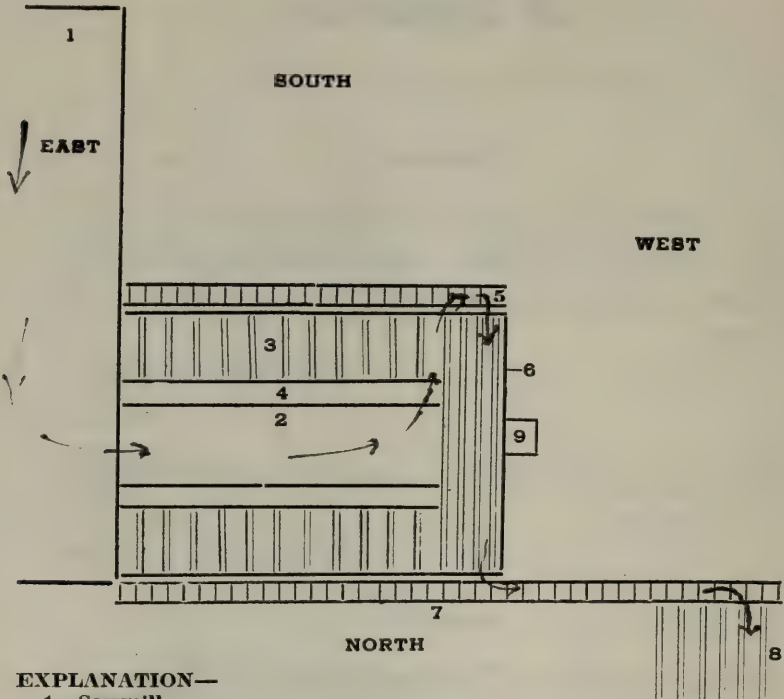
Defendant in Error.

Brief of the Defendant in Error

STATEMENT OF THE CASE.

To correct the many errors appearing in Plaintiff in Error's statement of the case, and to place the facts more in detail before the Court, we find it necessary to make an additional statement of the case and to assist the Court in getting a clear and correct idea of the relative location and direction of the mill, chain shed, short-tracks, transfer-tracks, and yard referred to herein, we have made a drawing, here

at the beginning, to show the location of the objects mentioned:



EXPLANATION—

- 1 Sawmill
- 2 Transfer chain
- 3 Twenty-two Short tracks.
- 4 Loading Platform
- 5 Transfer Tracks
- 6 Long tracks at West end.
- 7 Transfer track.
- 8 Tracks in Yard.
- 9 Moe's office at west end of platform.

The lumber comes from mill (1) along transfer chain (2) taken by men on (4) from off chain (2) and placed on cars standing on tracks (3) cars pushed from tracks (3) onto transfer car on track (5) transfer car with trucks of lumber on it moved opposite tracks (6) where the cars of lumber are pushed from off the transfer car across the platform on track (6) to another transfer car on track (7) and carried on transfer car on track (7) to tracks in yard (8).

It is necessary that the Court, at the beginning, distinguish between the trucks, sometimes called cars, and the transfer cars. The trucks, or cars, were 8

feet long, 2 feet high, and 48 inches in width. Lumber was loaded onto these trucks from the transfer chain and then the trucks or cars were moved a distance of about twenty-two feet and shoved onto a transfer car. The transfer car had two tracks on it running crosswise of the car which could be put in line with the tracks on the transfer platform, and the cars or trucks of lumber were thus taken from the transfer shed upon transfer cars out into the yard.

Andy Moe was the Foreman, having charge of the transfer chain, taking the green lumber from the chain, placing it on the trucks and transferring it to the yards where it was piled. He quit the employ of the Defendant in Error shortly after the accident complained of in this action and was the Plaintiff in Error's principal witness. He transferred Sundin from working on the tracks to transferring lumber from the shed to the yard by means of the trucks on April 3, 1916. Sundin worked at this employment until up to the time he was injured, May 16, 1916. His duties, in conjunction with Harry Brewsted and Knuteson, and sometimes with the assistance of the Foreman and others, were to push the loaded trucks of lumber from the transfer shed along the tracks thereon on to the transfer car, and to move the transfer car with the loaded trucks of lumber on it out into the yard. His duties were also to replace an

emptied truck from where they had taken the loaded truck. Whenever a truck was loaded sufficiently, this transfer gang would move it on to the transfer car from off the short-tracks and replace the loaded truck with an empty truck. The top of the load complained of and which fell in Sundin, was not to exceed 6 feet from the floor of the transfer platform, and not to exceed 4 feet from the floor of the truck. It consisted of 8 tiers of boards 6 inches wide, almost an inch thick and 16 feet long. These tiers consisted of the 6 inch boards piled one upon the other and whenever the chain-gang which loaded the lumber on to the trucks thought it necessary they would put cross-pieces or laths crosswise on the load to hold the tiers together, and then would again pile the 6 inch crosspieces one upon another. The loads of four and six inch boards require more crosspieces than boards ten or twelve inches wide. these crosspieces ordinarily projected from the side of the load, and when they did not project outside of the load they necessarily left an opening between the boards between which they were placed, so that a man standing by the side of the load could tell by a casual glance whether or not there were crosspieces in the load.

Sundin was a man of ordinary height, and, as I have stated, the top of the load was not to exceed 6 feet from the floor of the platform. All of the work

mentioned, the tracks, trucks, cars, places and appliances, were out-of-doors in the open daylight. The tracks on the surface or top of the transfer cars, were on a level with the tracks on the platform. As the transfer car had to be moved up and down along side of the transfer platform so that the tracks on the transfer car would be in line with the tracks on the transfer platform, there was some space between the ends of the tracks on the transfer cars and the ends of the tracks of the transfer platform, and necessarily, when a truck of lumber was moved from off the tracks of the platform onto the transfer car there would be some shock or jar to the load of lumber. There were always a number of tiers on the trucks of lumber above the last crosspiece. Tiers or lumber would frequently fall from off a truck of lumber no matter how many crosspieces were placed in the same, and no matter how level the track.

On the day of the accident, the deceased had begun work at 7 o'clock and had taken out a great many loads from the North side of the transfer shed. The Foreman, Andy Moe, had assisted Knuteson, Sundin and Brewsted to move the loads from the North side of the transfer shed. As they were going across the West end of this platform the foreman said to Sundin and Knuteson. "We will take out that load next", and pointed to this load, a part

of which afterwards fell. The foreman and men could see this load in question from the West end of the platform. There was no roof over this part of the work and it was out in the daylight. The load, therefore, that fell was open and obvious to the men moving it.

Sundin, Knuteson and Brewsted then went to move the truck of lumber in question which stood on the second track on the South side of the transfer shed from the West end of the same. A workman by the name of Olaf Higestrom, together with Knuteson and Brewsted got behind the car up against the transfer shed and pushed the same southward along the short-track towards the transfer car. The deceased stepped up to the truck of lumber in question, placed his back against the same at about the middle of the truck from end to end, took a hold of it with his two hands, and helped shove it up against the tracks on the transfer car. It would not go up onto the transfer car and they moved it back about 6 or 8 feet from the transfer car and again shoved it up against the transfer car, and it would not go up onto the transfer car this time. The deceased remained with his back up against the truck of lumber during all this time. They again took the truck back a few feet from the transfer car and again shoved it up against the transfer car and this time the

front wheels of the truck went up onto the transfer car and the upper part of the load slid off side-wise against the back of the deceased pushing him forward, falling on him in such a manner as to cause him injuries from which he afterwards died.

He was an experienced man in handling trucks of lumber and had worked at this same job for the Defendant in Error Company for six weeks.

Mr. Moe, the foreman, had often warned the men, including Sundin, to keep away from the sides of the loads. It was customary in all yards in the vicinity of the mill of Defendant in Error, for the men handling the trucks to observe themselves as to whether or not there were crosspieces in the load, or whether or not the load was solid on the truck, and that no matter how well a load may be loaded, occasionally a part of it will fall off.

There was no occasion or necessity for the deceased to place his back against the side of the truck of lumber. The ends of the tracks on which the particular load was being moved at the South side of the transfer shed, and next to the transfer car, were sunken so that they were something like an inch and one-half below the level of the tracks on the transfer car.

In the Plaintiff in Error's Complaint, it was

alleged in Paragraph 17 thereof, that while Sundin knew of the difference of the height of said transfer car, and the necessity for violent and extraordinary movement of said car, in order to overcome the obstruction, caused by the difference in height, he complained to the said Foreman, Ed. Moe, of the condition of said track and transfer car, and the necessity for the violent shoving of said car of lumber upon said transfer car, which complaint was made to said Ed. Moe, immediately upon being ordered to go around and assist in the movement of said car of lumber, and said Moe, as foreman, promised said Sundin that the same would be repaired in a few days.

The evidence shows that deceased Alex Sundin, was warned a number of times to keep away from the side of the cars. On account of the lumber being apt to fall over he should have stayed away from the side of the cars at all times, but as the evidence shows even if the track on the platform and the track on the transfer car was in line and perfectly level there would be a short open space between them, and our ordinary intelligence teaches us that there would be more or less of a jar in going across this opening, and in a heavy truck of lumber moving from a stationary platform onto a movable transfer car. The plaintiff did not heed the warning to keep away from the side of the car but assumed a dangerous

position at the side and remained in such dangerous position after there had been two severe shocks to the car.

PLAINTIFF'S ALLEGED GROUND OF NEGLIGENCE.

Reading plaintiff's complaint only two grounds are set forth:

1 It is alleged that the falling and collapsing of the lumber pile from said car was due wholly and exclusively to the negligence of the defendant in the manner in which said load was piled on said car, in that no cross pieces were inserted between layers of lumber of said car (page 12 of the Transcript.)

2. It is alleged that the tracks on the transfer car were higher than the tracks on the transfer platform, and that said condition was one of the contributing causes of the death of Alex Sundin. That Sundin knew of the defect and had complained of the same to the foreman Andy Moe. (Page 14 of Transcript.)

ARGUMENT.

IT APPEARS FROM THE UNCONTRADICTED TESTIMONY OF BOTH PLAINTIFF AND DEFENDANT THAT THE ACCIDENT COULD HAVE OCCURRED IF THE MANNER IN WHICH IT DID, EVEN THOUGH THE TRACK HAD BEEN SMOOTH AND THERE HAD BEEN CROSSPIECES IN THE LOAD OF LUMBER. IN OTHER WORDS, IT APPEARS FROM THE PLAINTIFF'S EVIDENCE THAT PARTS OF LOADS OF LUMBER DO FALL OVER IN ALL YARDS EVEN THOUGH THE TRACKS ARE LEVEL AND CROSS PIECES ARE INSERTED IN THE LOADS.

In regard to the above contention of the defendant, we desire to call the court's attention to the fact that the lumber comes out from the mill on an endless chain and that on each side of this endless chain there are about seventy tracks running at right angles from said transfer chain upon which cars or trucks are placed. The men working on the transfer chain lift the lumber moving thereon onto these cars. The lumber is piled onto these trucks or cars only for transportation to the yard. The cars have only a short distance to go and the lumber necessarily has to be piled onto them and taken off in a reasonably rapid manner. The trucks

are only two feet high from the track upon which they run and the highest the loads are permitted to be is about six feet from the ground. The moving of these trucks along the track would appear to be a very simple operation. The top of the loads come to about the height of a man's head. The men work from behind the loads pushing them. Mr. Moe was the plaintiff's principal witness and testified as follows (P. 102, tr-----):

Q. Is it not a fact that always above the last cross piece there are a number of pieces that are not held by anything?

A. There should be, but sometimes there will be only a few boards sometimes; if the transfer men think the load is big enough they will take it out, even though the cross pieces are right on the top.

Q. But usually there are a number of tiers above the last crosspiece?

A. There should be, and usually is.

Q. Is it not a fact that a board may fall off, no matter how well a load may be loaded?

A. Yes, and it might fall off, no matter how they were loaded. I have seen that.

Q. And a tier of a load or the top of the two tiers or three tiers might slide off of a load?

A. I have seen that, too.

Q. That is a thing that may happen in any yard, is it not?

A. Yes, it might happen in one yard as well as another.

Q. And that is one of the things that the men of experience moving trucks guard against, is it not?

A. Yes, it is the same as any other kind of work; it don't make any difference what it is; they have got to look for something.

* * * * *

MR PLUMMER: Q. Mr. Moe, counsel asked you if sometimes lumber didn't fall off from these cars. Now in moving this car of lumber, of the kind that was being moved when Sundin was hurt, and the distance it was being moved before it came to this end of the track that we claim was out of repair before it came to that, and being shoved along as has been described here, what would cause the lumber to fall off, going that distance, under those circumstances?

A. I couldn't tell.

Q. Do you know of anything? A. No.

MR. NELSON: But it will sometimes do it, won't it, Mr. Moe?

A. Certainly it will.

There is no evidence introduced upon the part of either plaintiff or of defendant that would contradict the above statements in any respect. It must appear to the court that it could not be otherwise in moving upon a track a car of lumber such as was being moved at the time of the accident. The truck was forty-eight inches wide and on this truck there were eight tiers of six-inch boards, piled fifty-five boards high. The falling over or tipping over of such tiers from the truck would be one of the risks

incident to the work in which plaintiff was employed. To show the probability of such a load falling over as the one in question did fall, we quote from the plaintiff's evidence, which was uncontradicted, appearing on page 90 of the transcript:

Q. How many (referring to crosspieces) were usually put in these loads that fell—of the size that fell on Mr. Sundin?

A. Maybe two, maybe four, or maybe five or six.

Q. What would determine the difference, as to the number, just describe that, will you?

THE COURT: Why do you have more sometimes than others?

A. Because this narrow lumber is very easy to fall over.

MR. PLUMMER: Q. And what are the widths of the lumber, what are the usual widths? What do you mean by narrow lumber and wide lumber.

A. One by six is narrower than one by twelve, and easier to tip over.

* * * * *

Q. What was the width of the lumber that fell over on Sundin?

A. One by six.

It is therefore the defendant's first contention that the falling over or the collapsing of the truck of lumber was one of the risks incident to plaintiff's employment, and that as the truck of lumber is small and everything about it open and obvious and

all of the work in connection with it out in the daylight, and that since loads of lumber would fall without any negligence up on the part of the defendant or its employees, it is therefore the contention of the defendant that the falling of the lumber as it occurred in this case was a risk incident to the employment of plaintiff.

PLAINTIFF KNOWING THE TRACKS TO BE UNEVEN ASSUMED THE RISK OF THE LUMBER FALLING OVER.

We have shown that in paragraph seventeen of plaintiff's complaint that it is alleged that plaintiff knew of the unevenness of the track and had made complaint of the same to the foreman. In the trial of the case it was stated, however, that he was unable to prove that complaint was made to the foreman. It therefore stands that plaintiff knew of the unevenness of the track. Since he did know of the unevenness of the track and since loads of lumber were apt to fall over even under the best of circumstances, then certainly he assumed the risks of the load falling over on account of running up against the obstruction in the track, to-wit, the unevenness of the track of the platform and transfer car.

The load in question was shoved three times by the deceased and his associates against this obstruction. These tiers of lumber fifty-five boards high on

account of such a jar would necessarily be apt to fall off. The plaintiff of course knew of these facts, and we do not see how the court can get away from the conclusion reached by Judge Deitrich, and we quote from his statement to the jury when the case was taken away from the jury in the lower court:

‘The other negligence referred to, as I have already stated, is that the track at this particular point was permitted to get out of order and become a little lower than the other track, some testimony tending to show that it was in the neighborhood of an inch and a half lower. It is alleged in the complaint that the deceased knew of this faulty condition or defective condition of the track, and that he said something to the company, or an officer of the company, about it, at least that he knew of it, but whether that has been alleged or not the evidence would seem to leave no doubt that he did know of it, for as testified to by the several witnesses, when they started to put this truck load of lumber upon the transfer car, it met with this obstacle; they pushed it forward until it reached the track on the car, and it would go no further, and they pulled it back to give it a start, and again tried, and they did this at least twice, and I think some of the testimony shows that they did that three times. And it is further shown that he was at the side of the car, had a hold about the middle of the car or truck, so that even had he not made this allegation in his complaint the inference would be inevitable, unavoidable, that he knew of the obstruction there, and I can’t escape the conclusion that it must appear to all that he, with his age and experience, and apparent intelligence, must have been able to appreciate what would be obvious to a child, that rolling this heavy truck against the two projecting ends

of the rails would jar the truck—that must have been appreciated by him,—and that the jar would tend to dislodge the lumber, that is, it would give a shock to the lumber, and if any of it was loose it might fall off,—not that it would, but it might so that, as an intelligent man, he was bound to take cognizance, knowing of the obstacle there, the projection over which the wheels had to roll, it was incumbent upon him to take knowledge that there would be some danger, and to protect himself against the danger. That isn't necessarily saying that he knew that this lumber was not properly bound by the cross ties. I do not make any such suggestion as that at all. But he was able to appreciate the fact that rolling this heavy truck load of lumber against the projecting ends of the rails upon the transfer car would give the truck a shock which would tend to dislodge the load being carried upon the track."

It seems to us that our first two contentions should decide this case and that even though the plaintiff had been guilty of no negligence whatever still he would be barred from recovery in this case. However, as our third contention we assert that under the law and the uncontradicted evidence of the plaintiff and defendant in this case the *plaintiff was guilty of contributory negligence in working at the side of the car, since he knew of the defective condition in the track and since he was warned not to work at the side of the load.*

The testimony as to the warning against working at the side of the load is as follows (Testimony of plaintiff's witness Andrew Moe, page 101, tr.):

THE COURT: I want to ask the witness a question. You spoke of warning these men from time to time as you saw that a load didn't seem to be quite safe. Is that more or less of a common thing, that a load wouldn't be quite safe?

A. Yes, sir, so far as I have seen in the lumber yards, it is a common thing that there are some loads that are not safe.

* * * * *

THE COURT: (Testimony of same witness, page 41 tr.) Well, if the cars are so close together as that, how does a man get to the side of the car to push it?

A. They ain't supposed to go alongside of it. They are supposed to go behind it and shove it up.

MR. NELSON: (Testimony of same witness, page 97, tr.) I understood you in answer to Judge Dietrich's question, to state that there were no rules down there about working around these loads. I will ask you whether or not it is a fact that you often warned the men working under you to keep away from the sides of the loads?

A. Yes, sir.

MR. NELSON: Is it not a fact, Mr. Moe, that on several occasions you warned the deceased, Axel Sundin, to keep away from the side of the load?

A. I warned them all, I believe, numbers of times.

Testimony of Joe Freitag, page 106 of transcript:

Q. I will ask you whether or not you and

he (referring to deceased) ever had any conversation as to the danger of getting alongside of a load of lumber?

A. Yes.

Q. What did he say to you in that regard?

A. It was in the morning, the first time, on the day shift. I worked with him on the day shift, and we were taking the car out, the first truck, just the first time. I will show you. I go to the side here and push it out, the truck, and Mr. Sundin—from the chain—

Q. Just tell what he said to you.

A. He worked there, and he said, "Joe, come back; on the side is too dangerous."

Q. You were at the side of the truck of lumber, were you?

A. I stand there.

Q. You were partly at the side of the truck? A. Yes.

Q. And Mr. Sundin said, "Joe, get away; it is too dangerous?" A. Go back—

MR. PLUMMER: We object to that as leading.

THE COURT: He said, "Joe, go back; it is dangerous?"

MR. NELSON: Q. He said, "Joe, go back, it is dangerous?"

A. Yes.

Q. State whether or not, shortly after that, any other person in Mr. Sundin's presence warned you about the danger of working alongside of a truck of lumber? Answer that yes or no.

A. A short while after come Mr. Moe, after

the warning came Mr. Moe out there and Moe crossed to me, and he said, he tell me, "Freitag, don't push the truck from the side; it is too dangerous." He give me that advice.

* * * * *

THE COURT: Was Mr. Sundin there when Mr. Moe said that or not?

A. Yes, Mr. Sundin, first, he warned me.

THE COURT: Yes, but when Mr. Moe said that to you where was Mr. Sundin?

A. Behind this truck.

* * * * *

MR. PLUMMER: (p. 111, tr.) Moe testified that he told them not to push on the side there when it looked dangerous.

THE COURT: But that isn't what this witness testified. He testified that the deceased, that Moe told him not to push from the side of it because it was dangerous. He didn't say why.

* * * * *

Q. (By Mr. Plummer) When you say that Sundin told you not to push on the side where was Sundin then?

A. Where was he?

Q. When he told you that. A. Close to me.

Q. And where were you? A. Outside.

Q. Down here?

A. Oh, no, right here. I took it here from the corner and push, and he said, "Joe, go away; outside is dangerous."

* * * * *

Q. You mean that was the first morning you went to work?

A. No, this day the first time.

Q. When was this, how long before he was killed?

A. One week before.

THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE—NOT ONLY BECAUSE HE WORKED ALONG SIDE OF THE LOAD OF LUMBER WHEN HE KNEW THE TRACK WAS UNEVEN, AND CONTINUED TO DO SO AFTER THERE WERE TWO SEVERE JARS TO THE LOAD OF LUMBER—BUT BECAUSE HE SHOULD HAVE OBSERVED THAT THERE WERE NO CROSS PIECES IN THE LOAD OF LUMBER.

The uncontradicted testimony of both plaintiff and defendant shows that deceased could have observed, had he used ordinary care, that there were no crosspieces in said load of lumber. The evidence shows that Andrew Moe, the foreman, the deceased and two other men, had taken a truck load of lumber to the yard and had returned to the west end of the transfer platform and when they were about opposite the little office marked "9" in the drawing in our brief, Mr. Moe, the foreman, said: "We will take that load next," pointing to the particular load that afterwards fell. It therefore follows that this load could have been observed as far away as the west

end of the transfer platform. Mr. Moe, plaintiff's witness, testified (p. 98, tr.):

Q. Do you remember as you were going across the west end of this platform, that you said to Sundin and Knudson and Brewsted, "we will take out that load next," and pointed to this load that afterwards part of it fell?

A. Yes, I did.

Q. Then you could see that load from the west end of the platform at that time?

A. Yes, sir, we could see it.

Q. It was all out in the daylight, all of this work?

A. Yes.

Q. No roof over where they were working or anything?

A. No, not where they were working, no.

Q. I will ask you if it is not a fact, Mr. Moe, that there are ten tracks west of the west end of the chain shed, out here?

A. Yes, sir.

Q. And out at the end, at this west end of this platform, there is a little office is there not?

A. Yes, sir.

It is apparent, therefore, that there was nothing between this load and the men as they approached it and that it could be seen while they were approaching it for a distance of thirty feet or more. They approached it, as will be seen, from an examination of this diagram, from the side that afterwards fell onto Sundin.

The plaintiff's witness, Mr. Moe, testified that the absence or presence of these crosspieces could be observed by a casual glance at a load of lumber. We quote from his testimony (p. 38, tr.):

Mr. Moe, when a man of ordinary experience in handling lumber or trucks of lumber is at the side of one of those trucks of lumber such as the one complained of in this case, can he tell by casual observation of that load of lumber whether or not there are any crosspieces in the load?

A. I don't know whether anybody else can tell, but I could generally tell by a glance of the eye.

Q. Could the ordinary man who had had experience in loading lumber and shoving these trucks for a month or six weeks or longer tell by a casual examination of it from the side of it as to whether or not there were cross pices in that load?

A. He could if he thought of it and looked for them.

Q. If he had thought of it and looked by a casual glance at the load he could have told?

A. Yes, sir.

As a matter of fact the plaintiff's attorney Mr. Plummer, in the trial of the case in the court below, admitted this to be true. And we quote from some of the testimony of Harry Brewsted, one of the plaintiff's witnesses (p. 69, tr.):

Q. Ask him if Sundin could not have turned his face around and looked at the side of that

car of lumber and have seen whether or not there were crosspieces in the load?

MR. PLUMMER: We object to that as calling for the conclusion of the witness.

THE COURT: Yes, I think the jury is just as competent to answer that question as he is.

MR. NELSON: Only he has worked around these cars all the time.

THE COURT: But isn't it obvious that the deceased could have seen it if he had turned around to look for it?

MR. NELSON: Well, if it is obvious, that it—

MR. PLUMMER: We admit that.

MR. NELSON: Q. Whenever these crosspieces were in the load there was an opening between the boards, was there not?

THE COURT: That must necessarily follow.

As a matter of fact the plaintiff admits, and the evidence shows, that the deceased had his back to the load of lumber during all of the time that he was moving it, but the mere fact that he turned his back to the load will not excuse him from failing to observe whether or not there were crosspieces in the load or whether or not the load appeared safe. This testimony was borne out by the uncontradicted testimony of the defendant's witnesses, and we will quote from only one, that of John Salsberg (p. 120, tr.):

Q. I will ask you whether or not, Mr. Sals-

berg, a man of experience, from the side of a truck, can tell by a casual glance at that truck whether or not there are crosspieces in the truck of lumber?

* * * * *

A. When there is crosspieces in the load they can see that all right.

Q. He can see if there are crosspieces in the load? A. Yes.

It will appear from the testimony that sometimes these lath or crosspieces were put in the load straight across and projected out some inches to the side, and at other times they were put in in such a manner that they came only to the side of the load, but as has been shown, when they came only to the side of the load the fact that they were in there caused an opening to exist in the layer of boards and thus made the fact obvious to anyone as to whether or not there were crosspieces in the load. The evidence in this case shows that the load was moved three times before it was gotten upon the raised track of the transfer car, and yet with this load fifty-five boards high the plaintiff is contending that he should be excused from failing to observe as to whether or not there were crosspieces in this load. As a matter of fact they had to pull the car back a number of feet to get a start and, of course, the momentum of the load going up against this obstruction must have caused a considerable jar, and it seems to us that any

ordinarily prudent man would have turned around and taken a casual glance to see whether or not the load continued to be safe. We quote from the testimony of Harry Brewsted (p. 64, tr.) one of plaintiff's witnesses, to show the first time the car went up against the obstruction it had gone a distance of twenty-two feet, the entire length of the track from the transfer shed to the transfer car, and necessarily had great momentum.

Q. As nearly as possible, tell me where the car was that you were pushing when you first turned and looked towards it?

A. He says when it stopped by the transfer car the first time.

Q. When it stopped by the transfer car the first time?

A. Yes.

Q. Had the car been going all the time from the time you first began shoving on it until it went upon the transfer car?

A. Yes.

Q. How many times did you push it up against the transfer car?

A. Three times.

* * * * *

Q. How long a time did it take from the time you began shoving the car away from the transfer shed, was it until Sundin was injured?

A. About three minutes.

We think it also must be apparent to the court

that plaintiff was guilty of contributory negligence in working alongside of the car of lumber and continuing to work there for a period of three minutes when he could have told by a casual examination as to whether or not there were crosspieces in the load. We think he would have been guilty of contributory negligence had he worked alongside of the load of lumber, even though there had been crosspieces in the load, for the reason that it appears from the testimony of all the witnesses that the number of crosspieces varied from two to six, and as the loads were apt to fall even though there were sufficient number of crosspieces in the load, his negligence is conclusive when it is remembered that three times this load was taken and run up against the obstruction and the deceased continued to stay at the side of the load.

THE EVIDENCE SHOWS THAT PARTS OF THE LOAD OF LUMBER WOULD FALL OFF WITHOUT ANY NEGLIGENCE ON THE PART OF THE DEFENDANT AND EVEN WHEN THE TRACK WAS LEVEL, THEREFORE THE DECEASED WAS CONCLUSIVELY GUILTY OF CONTRIBUTORY NEGLIGENCE WHEN, KNOWING THE FACT THAT THE TRACKS WERE UNEVEN, HE TOOK A DANGEROUS POSITION WITH HIS BACK

AGAINST THE LOAD OF LUMBER AND REMAINED IN SUCH DANGEROUS POSITION AFTER THE TWO JARS TO THE LOAD, WHICH OBVIOUSLY WOULD WEAKEN IT.

In his opening statement plaintiff stated to the jury that at the time he was injured he had his back up against the load of lumber. The witness, Harry Brewsted, on the part of plaintiff, stated (p. 65, tr.) that when the load was being shoved Sundin worked at the side of the load with his back to the load. We have shown elsewhere in our brief that the men were instructed and warned by their foreman not to work at the side of the car. We have shown by the fellow-servant of Sundin, which is undisputed, that Sundin himself had instructed this witness not to work at the side of the car on account of the danger from the load falling off onto him, yet it is admitted in this case that Sundin worked with his back to the load for three minutes during which time the load of lumber was with a good start shoved up against the obstruction in the track which necessarily caused a great jar to the load. The undisputed evidence in this case not only shows that men were warned not to work at the side of the load but that a reasonably prudent man would not work with his back up against the load as did the plaintiff in this case at the time he was killed. We quote from witness Salesberg (p. 121, tr.):

Q. I will ask you, Mr. Salesberg, in your opinion, whether or not a reasonably prudent man of experience in moving trucks of lumber would go along the side of the truck of lumber composed of six inch white pine an inch thick, and sixteen feet long, and piled from fifty-four to fifty-five tiers high, at least from fifty to sixty tiers high, when there are no crosspieces in it, and place his back up, get in the middle of the truck of lumber, and attempt to assist in moving it?

A. No, sir.

It must appear to the court that this man unnecessarily and foolishly and unfortunately voluntarily assumed a dangerous position and continued therein when the dangers were added to by the jar that the load was subjected to in moving it. The evidence shows that the place the men were to work was at the rear end of the car. (pp. 44, 97, 106, 107, 111, 120, 121, 132).

THE EMPLOYEE WHO FAILED TO PUT IN THE CROSSPIECES, IF THERE WERE SUCH FAILURE, WAS A FELLOW SERVANT OF SUNDIN.

The evidence in this case is that the boards came out from the mill on an endless chain and were taken off the endless chain by an employee of the defendant and placed upon the truck. He was instructed to put in crosspieces in each load of lumber. The deceased Sundin and his associates took the

load of lumber and pushed it a short distance into the yard. They could have complained to the chain-man at any time that he was not putting in a sufficient number of crosspieces. They came in contact with him and were simply assisting in carrying the boards a little further from the mill. It was one continuous operation of taking the boards from the mill to the yard. All these men were under the same foreman, and certainly were fellow servants under the decisions of the courts of the state of Idaho. The master furnished sufficient crosspieces to the chain-man and if there was a failure to put the crosspieces it was a detail of the work that the master could delegate. We quote from the witness Moe (p. 38, tr.):

Q. Now in regard to those crosspieces—the men working up on the chain shed put in the crosspieces on the load, did they not?

A. Yes, sir.

Q. And where were these crosspieces kept, so that they could get them and put them in these loads?

A. They were kept overhead, in different places, where they would be handy to get them.

Q. Convenient to where they worked?

A. Convenient to where they worked.

Q. There was a supply kept on hand all of the time, and whenever they wanted one or thought one ought to go in the load they could get it and put it in the load?

A. Nearly all the time they were there.

In the case at bar the failure to put in crosspieces was simply a detail of the operation and the master having furnished sufficient crosspieces and instruction to use them, and having delegated this detail to an employee, he is not liable for such employee in an isolated instance because he failed to put in crosspieces. The Supreme Court of Idaho in a case involving signals has sustained this doctrine, *Weisner v. Bonners Ferry Lumber Company*, 29 Idaho, 526. The Court says on page 539 of its opinion:

“This Court held in *Larsen v. La Doux*, 11 Idaho 49, 81 Pac. 600, that if the act is one pertaining to the duty the master owes to his servant, he is responsible for the manner of its performance by the servant to whom it is intrusted; but if it is one pertaining only to the duty of an operative, the employee is a fellow-servant with his collaborators of whatever his rank, for whose negligence the master is not liable; that, in short the master is liable for the negligence of an employee who represents him in the discharge of his personal duties to his servants, and beyond this he is liable only for his own personal negligence.”

Under the Idaho authorities cited herein it clearly appears that the employee whose duty it was to put crosspieces in the load of lumber was a fellow servant of deceased. If it is A's duty to take the boards from off the transfer chain and hand them to B, whose duty it is to carry them and hand them to C to pile up in a yard, they are clearly carrying on a common enterprise and are fellow servants. They

all work in close proximity to each other and necessarily could complain to each other of any defect that might arise. If it is A's duty to take the boards from off this transfer chain and pile them on a table and it is B's duty to lift them and hand them to C to pile in the yard they are still fellow servants. And if it is A's duty to take the boards from off the transfer chain and pile them on a truck and it is B's duty to push the truck out into the yard to where C piles them, they are none the less fellow servants.

AUTHORITIES AS TO FELLOW SERVANTS.

In the case of *Larsen vs. LaDoux*, 11 Idaho 49; 81 Pac. 600. The Supreme Court of this state has well defined the fellow servant doctrine within the state. In that case some contractors were building the Elk's Temple in Moscow. The plaintiff was employed with one K to furnish mortar and brick to the brick layers. One B was the manager in immediate charge of the construction of said building for the contractors. After the brick work on the Northerly side of the building was completed it was necessary to erect a scaffold across the west end of the building for the use of the brick layers. B directed K to erect such scaffold, and in doing so it was necessary for him to put in place two joists or crosspieces on which to lay the floor of the scaffold.

From a lot of material furnished for that purpose, he selected two pieces, and one of the brick masons nailed the ends thereof in place. Thereafter B and K laid some boards on said scaffold and thereafter the plaintiff assisted K in completing the erection thereof. B directed K to lap the ends of the floor across the joists, which he neglected to do. Thereafter the plaintiff and K placed a considerable quantity of mortar and bricks on said scaffold and the section supported by one of the cross-pieces fell, the cross-piece having broken and in the fall the plaintiff was injured. Held, that if there was negligence or carelessness in placing a defective crosspiece in said scaffold, it was the negligence and carelessness of a fellow servant and that the employers were not liable therefor.

In this case it was held that having furnished safe material for the erection of said scaffold and having directed K to construct it safely, the contractors were not liable for the carelessness of K in constructing the same.

This case has been repeatedly approved by our State Supreme Court and was so approved by the late case of *Wiesner vs. Bonners Ferry Lumber Co.*, 29 Idaho 526; 160 Pac. 647, and while this case has specific reference to the giving of signals, it is fully in point in reference to the failure of a servant, no

matter what his rank may be, in failing to put in crosspieces in the load when this is a detail of the work.

The Circuit Court of Appeals of the Eighth Circuit in the case of *Woods v. Potlatch Lumber Co.*, 213 Fed. 591, has settled the question in this case as to fellow servants. In that case A was working at the bottom of a burner repairing the brick work and was under the direction of a foreman B. C was working on a conveyor under the directions of foreman D. C carelessly threw some boards from where he was working and injured A. Held, that C and A were fellow servants.

The *Larson v. LaDoux* case was also approved in the case of *Coulston v. Dover Lumber Co.*, 28 Idaho 396, which held that the head sawyer and tail sawyer were fellow servants, and we submit that if the man who saws the logs into boards is a fellow servant with the man who first handles these boards, the man who first handles these boards is a fellow servant with the next man who handles these boards in piling them into piles and who in turn is a fellow servant with the next man who takes the piles of boards and shoves them onto a transfer car.

The doctrine of fellow servant as applied by the Supreme Court of Idaho in *Snyder v. Viola Mining & Smelting Co.*, 3 Idaho, 28 Pac. 127, is

in point in that case. S was a miner engaged in underground work and G was a blacksmith engaged in sharpening tools for the men working underground. It was held that G and S were fellow servants.

In the case of *Fraser v. Red River Lumber Co.*, 47 N. W. 785, the court said:

“All the men employed in the lumber yard, whether piler, scaler, sorter, or measurers, altho engaged in different departments of the work, were all in the employment of the same general control, and engaged in promoting the same common object. All the different branches of labor, including the piling, were parts of the common everyday work of the yard. The making of the piles, including the projecting steps, was itself but a part of the work these men were employed to perform; and all who were engaged in that yard, whatever the particular line of their services were to each other, and as to every part of the common enterprise which they were promoting, fellow-servants. Hence the defendant is not liable to the plaintiff for the negligence of those who pile the lumber.”

See also Sec. 1423, note (1), page 4089, of *La Batt's Master & Servant*, where the authorities are gathered at length upon this question.

CASES CITED BY PLAINTIFF IN SUBMITTING DOCTRINE OF ASSUMPTION OF RISK.

We will not discuss separately each case cited by the plaintiff in his brief, but since he seems to have

relied on this case in particular we desire to call the Court's attention to wherein it differs from the case at bar. The plaintiff says that the case of *Gaudie v. Northern Lumber Company*, 34 Wash. 34, 74, Pac. 1009, seems to be on all fours with the case at bar. We desire to call the Court's attention to the fact that in the case at bar the injury occurred out in the open daylight where everything was open and obvious, and where the plaintiff as he alleges, knew of the unevenness of the track, and the only defect he claims not to have been aware of was the absence of crosspieces in the load of lumber. In the *Gaudie* case cited by the plaintiff the men were working in a dry kiln. It seems there were no windows and the only light entering the kiln came through the doorway. A number of men were working around the car further interfering with the light so as to prevent the men from seeing where they were working. On account of the hot air in the kiln, the men had to work unusually rapid so as to get the fresh air. There was not a solid floor and they had to especially watch where they were walking. In that case the injured man was not working at his regular occupation, but was called in from the open where it was light suddenly into the dark kiln. It must be plain to the Court that the *Gaudie* case is not in point at all except that the car of lumber and the track are being used in both cases. The facts

surrounding the Gaudie case were entirely different from the case at bar. In the one case the defects were not open and obvious and in the other case they were open and obvious. In one case the work was being carried on in a dark kiln where the men were working at an unusually rapid pace and in the other case the men were working at their usual rate of speed out in the open daylight.

DEFENDANT'S CONTENTION AS TO ASSUMPTION OF RISK.

1st. In this case it is the contention of the defendant that if the defendant was negligent in maintaining an uneven track, the plaintiff knew of the same, as is shown by the allegations of this complaint.

2nd. If the defendant was negligent in not putting in cross-pieces on the loaded truck of lumber, the plaintiff knew that there were no cross-pieces in the truck of lumber, and therefore assumed the risk, or if he did not know of the absence of the cross-pieces, the failure to put them in was the negligence of a fellow servant of the plaintiff and therefore the risk was assumed by the plaintiff.

In the case of *Knauf v. Dover Lumber Co.*, 20 Idaho, 773, our court says in paragraph six of the syllabus:

“A servant in accepting employment assumes the ordinary risks incident to such employment, but the servant does not assume such risks as arise out of the negligence of the master unless such risks are known to the servant or are of such character that by the exercise of ordinary care upon the part of the servant he could have known the same.”

In the case of *Goure v. Storey*, 17 Idaho 352, our Supreme Court held that plaintiff in that case assumed all ordinary risks incident to the work in which he was engaged and that these included the risks that were obvious and patent, as the machinery was of the most simple kind and easily understood by one of ordinary understanding. The court in its opinion quotes from the case of *Rush v. Mo. Pac. Ry. Co.*, 36 Kan. 129 and says:

“What the servant may lawfully do, without negligence, the master may lawfully hire him to do, without negligence. The master cannot be bound to take greater care of the servant than the servant can of himself. If the danger is such that an ordinarily prudent man could assume it without being guilty of negligence, then same facts and the same reasoning which would show this would also show that there could not be any culpable negligence or any breach of duty on the part of another person for hiring him to assume it. There can be no negligence on the part of the one and not on the part of the other, where both are capable of understanding the danger and both are fully informed as to all of the facts.”

A truck of lumber is about as simple a device as

a man could work with, and a man handling and pushing the same is better qualified to tell whether the lumber is piled on in a safe manner, than any other person, and can tell by casual glance whether or not there are crosspieces in said truck of lumber, and whether or not the same is firm.

In the case of *Deaton v. Abrams, et al*, 110 Pac. 615, the Supreme Court of Washington in considering a case where a person was injured by the falling of a pile of lumber which he was directed to saw up, says:

“Where plaintiff had worked about wood yards for four or five years, and about the one in which he was injured for more than one year, and knew the conditions of his employment, and that a pile of wood 4 feet wide and 18 feet high, which he was directed to saw, but not to put his saw in a dangerous position, was dangerous and liable to fall, he assumed the risk of a dangerous position near the wood pile, so that his employer could not be liable for his injuries resulting from the wood pile falling.

“While a servant may rely on the duty of the master to provide a safe place in which to work, yet if he fails to discover such a defect as is apparent, if he used ordinary diligence to discover it, he cannot recover for injuries resulting from such defect.

“Where the danger is as obvious to the servant as to the master, both are upon an equality, and the master is not liable for an injury resulting from such danger.”

In the case of *Smith v. United States Lumber*

Co., 77 S. E. 330, the Supreme Court of West Virginia in considering a similar case says:

“Moreover, all that situation was as obvious to plaintiff as it was to defendant. It was only an ordinary situation which any man of discretion could understand in all its relations. Plaintiff could see as much danger in it as defendant had knowledge of. The liability of the lumber pile to fall was as apparent to plaintiff as to defendant. Where the servant is of sufficient discretion to appreciate the dangers incident to the work, and has equal knowledge with the master of the dangers, he takes the risk therefrom upon himself.”

The Supreme Court of Iowa in the case of *Brooks v. W. T. Joyce Co.*, 103 N. W. 91, holds, in a case similar to the one at bar, that the employe assumed the risk of the falling of the lumber and in that case says:

“The proprietor of a lumber yard, who allows lumber to be piled in such manner as to be dangerous to his servants is negligent in failing to furnish a safe place to work, though the lumber was originally so piled by employes for whose negligence the master would not be responsible.

“A servant employed in a lumber yard, who knew that the manner in which certain lumber was piled was dangerous, in that the pile might fall over, could not recover for an injury from the pile falling on him, he having assumed the risk.

A servant employed in a lumber yard, and who knew that the manner in which certain lum-

ber was piled was dangerous, in that the pile might fall over, was guilty of contributory negligence in attempting to take lumber from such pile.”

In the case of *Coulston v. Dover Lumber Co.*, 28 Idaho, 390, 154 Pac, 636, our Supreme Court held that where an employee has full knowledge of the unsafe condition of the premises or appliance and with which he has to work, he is deemed to have voluntarily assumed the special risk incident to such employment, subject however, to the exception that in case the servant notifies the master of such unsafe condition and objects to continuing work under the special risk incident thereto, but is induced to continue working under such risk by a promise of the master to remove the danger within a reasonable time, the servant does not thereafter assume the risk during such time. The Supreme Court however, said:

“In such cases the servant is deemed to have no cause of action unless he proves that his reliance on the promise of the master was the moving consideration for his consent to continue subjecting himself to such special risk.”

In this case it was held that the accident was caused by the negligence of a fellow servant, and the judgment of the lower Court was reversed, the Court holding necessarily that the negligence of a fellow-servant was one of the risks assumed by the servant.

PLAINTIFF'S CASES ON THE DOCTRINE OF CONCURRENT NEGLIGENCE.

We are surprised to find that upon examination of the cases cited by the plaintiff to sustain their doctrine of concurrent negligence there is not a case cited by them in their brief under this heading (pp. 48 to 66, inclusive of their brief) that touches upon or involves the question of concurrent negligence. All of the cases cited under this head go to the assumption of risk where only the negligence of the master is involved. We agree that the law is that plaintiff ordinarily does not assume the negligence of the master, unless the defects or negligence of the master are known to him, or are so obvious and patent that a reasonably prudent man should have known of them. The cases cited by plaintiff go no further than this. As a matter of fact they also sustain the doctrine that where the defects are open and obvious and are known or should have been known by the plaintiff in the exercise of reasonable care, then the plaintiff is held to have assumed the risk.

The first case cited by plaintiff is that of *Williams v. Bunker Hill & S. M. Co.*, 200 Fed. 211. This case is one in which an employee knew that a wire was charged but testified that he thought it would only sting him and did not know that there was enough power to do him any harm. It was held

that it could not be said, as a matter of law, that he assumed the risks.

The second case is that of Chicago, B. & Q. R. Co., v. Shalstrom, 195 Fed. 725. This is the only case of plaintiff from which we will quote, but they all agree as to the following holding, and in that we concur:

“A servant, by entering and continuing in the employment of the master without complaint assumes the ordinary risks and dangers of the employment and the extraordinary risks and dangers which he knows and appreciates.

“Although the risk of the master’s negligence and of its effect unknown to the servant is not one of the ordinary risks of the employment which he assumes, yet, if the negligence of the master or its effect is known and appreciated by the servant, or is “so patent as to be readily observed by him by the reasonable use of his senses having in view his age, intelligence, and experience”, and he enters or continues in the employment without objection, he elects to assume the risk of it, and he cannot recover for the damages it causes.

“When a defect is obvious or “so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence and experience,” and the danger and risk from it are apparent, he cannot be heard to say that he did not realize or appreciate them.

“The direct order of the master or the foreman to the servant to work at a specified place, or with certain appliances, does not release him from his assumption of the apparent risks and dangers of the defects in the place, structure, or

appliances that are “so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence, and experience.”

The third case is that of *National Steel v. Hore*, 155 Fed. 62. No negligence of fellow-servant is alleged or proven. Therefore there is no question of concurrent negligence. In that case the court simply held that plaintiff could not as a matter of law in that particular case be held to have realized the dangers.

The fourth case, *Bunker Hill & S. M. Co. v. Jones*, 130 Fed. 813, has no question of concurrent negligence involved. The master failed to furnish a reasonably safe place in a mine in that the roof was not safe, and it was held in that case that plaintiff had no sufficient knowledge of the same as to defeat his right of recovery.

In the fifth case, that of *City of Puget Sound v. Harrigan*, 176 Fed. 488, the plaintiff calls the court's attention especially. We have been unable to find where the same is at all in point as there is no question of a fellow servant involved. The conductor of a railroad train stepped off the train in performance of his duties onto what he thought was a platform, and it was held that owing to the insufficient lights, etc., the plaintiff did not realize the

dangers and was therefore excusable in his mistake of judgment.

The fifth case, is the case of New York, N. H. & H. R. Co. v. Vizvari, 210 Fed. 118, wherein it was held that plaintiff did not assume the risks of an instrument that he had been ordered to use.

The other cases cited by the plaintiff are state decisions which we will not specially refer to, but in them we assert there is no question of concurrent negligence involved but only a question of assumption of risk or some defect that the master was guilty of.

If there was no question of fellow servant we can see how the plaintiff might have cited the above cases to attempt to prove that he did not assume the risks of the defective track, although under these decisions it is clear that some courts would have held that under the case at bar the plaintiff had assumed the risk of the defective track because it was a defect open and obvious and concerning which he not only proved, but had alleged, knowledge of the same, and it was such an obvious defect and the work carried on was of such a nature that, as the court below said, even a child would be held to have appreciated the dangers arising therefrom.

CONCURRENT NEGLIGENCE.

Under the pleadings and the evidence in this case there could be no concurrent negligence. Concurrent negligence of the master and fellow-servant means that if there is negligence on the part of the master which would give the plaintiff a cause of action, and a fellow servant by some negligence concurs with the negligence of the master the negligence of the fellow servant will not *defeat* the action of the plaintiff. The negligent act of the fellow servant does not *add* to the cause of action of the plaintiff. It is not a part of his cause of action. Of course, ordinarily no plaintiff would plead the negligence of the fellow servant. The servant under ordinary circumstances assumes the negligence of a fellow servant. If the plaintiff alleges the two grounds of negligence, to-wit, the negligence of the master and the negligence of the fellow servant and fails to prove the negligence of the fellow servant and does prove the negligence of the master, he can recover; but if he fails to prove the negligence of the master and proves the negligence of the fellow servant he cannot recover. If he alleges negligence of the master and negligence of the fellow servant and proves that the negligent act alleged against the master was assumed by him his cause of action is defeated. The plaintiff at bar alleged the negligence

of the master and the negligence of the fellow servant, but proved that he knew at least of the negligence of the master, and under the evidence he clearly assumed the risks of such negligence. He will not be permitted to recover on the ground of the negligence of his fellow servant because this is one of the risks that a servant assumes. While, the negligence of a fellow servant will not be permitted to defeat a cause of action if the master was also negligent; it will not make a cause of action if the negligence of the master is obvious and apparent and thus assumed.

AUTHORITIES ON CONCURRENT NEGLIGENCE OF MASTER AND FELLOW SERVANT.

In the case of *Jones v. Milwaukee Electric Railway & Light Co.*, 133 N. W. 636, the Supreme Court of Wisconsin has recently reversed a case and instructed that a verdict should be rendered for the defendant, wherein the facts are so similar to the case at bar that we feel that the reasoning of that court is very pertinent to the facts in the case at bar. This is a very recent case. The court states the facts as follows:

“George A. Jones, a conductor on an inter-urban service * * * was killed * * * by being crushed between the wall of defendant's building and the handhold for the rear entrance

to one of its cars. * * * The verdict found that the car was suddenly and negligently started by the motorman without giving the usual signal, and that this was a proximate cause of the injury. It further found that the defendant failed to furnish to the defendant a reasonably safe place in which to work, and that such failure was a proximate cause of the injury. In and by the answer to the ninth question submitted, it was found that the deceased at and prior to the time of his injury knew of the dangers incident to his employment by reason of the failure to furnish a safe place in which to perform his duties. In answer to the tenth question the jury found that the failure of the deceased to exercise ordinary care did not in any degree proximately contribute to his injury. * * * and was not guilty of any negligence which directly contributed to his injury."

In this case the plaintiff claimed:

"That the assumption of risk so far as it is applicable to an unsafe place only includes those risks which arise from the proper, and not those which arise from the negligent operations of a fellow servant, even where the fellow servant is not performing a duty which the law casts on the master. Hence that, if plaintiff by actual knowledge of a defect or ample opportunity to know of an obvious danger assumed the risk arising therefrom, he did not assume the risk arising from the negligent act of a fellow servant acting jointly with the known unsafe place to produce the injury."

As we will see, that contention is identical with the contention of plaintiff in this case, but the court in that case said:

"But the rule which absolves the master

from liability where the injury is caused by the negligent act of a fellow servant of the injured is based on the theory that each servant assumes all risk of negligent injury by a competent fellow servant. So the logic of this question would lead to the conclusion that, where an employe was injured by the action of one assumed risk, he could not recover, but, if injured by the concurrent action of two assumed risks, he could recover. This is like adding two nothings to make something."

Anthony v. Leer, et al, 12 N. E. 561. In this case the plaintiff sought to recover damages by reason of falling thru a trap door in the floor opened without his notice by a fellow servant. In reversing the case and holding that an instructed verdict should be given for the defendant the court says:

"The negligence of the defendants, if any exists, must be found either (1) in the location of the trap-door in the passage-way; or (2) in failing adequately to protect or guard it. It is a complete answer to the claim of negligence in these respects that the plaintiff had full knowledge of the situation and of the arrangements for the protection of persons using the passage-way; and that, by continuing in the employment, he assumed the risks and hazards incident to the situation, and especially such hazards as might result from the non-observance by co-employees of directions designed for the protection of persons using the passage-way. The dangers to which the plaintiff was exposed were known and obvious. It is not the case where an inexperienced or uninstructed employe may know the facts, but may be incapable of drawing the proper inferences, or appreciating the dangers. The plaintiff was as fully

competent to understand the risks from the location of the trap door and its use, and from negligent conduct of persons employed in the planing-room, as were the defendants. The location of the trap-door in the passage-way was not per se a wrongful act. The defendants had a right to arrange their own premises in any way which suited their convenience, and were not bound to change the arrangement to secure greater safety to the employees. If the trap-door was not open to observation, or its existence was not known to those whose duty required them to use the passage-way, or if the defendants had omitted to give proper instructions to those employed in the planing-room, a different question would be presented. The general rule, that the servant takes the risk of obvious dangers connected with his employment, has been so fully considered in recent cases that further discussion is unnecessary."

In the case of *Murch v. Thomas Wilson's Sons & Co.*, 47 N. E. 111 the Supreme Court of Massachusetts holds:

"A pilot was furnished a stateroom, but was told that he might warm himself and rest in a small deck-house used for charts. In such deck house there was a stove burning a patent fuel, and having no pipe to carry the smoke or gas from the room. The pilot was told to leave the door open, to avoid possible danger from the fumes of the stove. While in the room with the door partly open, he noticed no smoke or gas from the stove. He went to sleep there, leaving the door open, but it was afterwards closed by a fellow servant, and the pilot was injured by asphyxiation. Held, that the risk was assumed."

In the case of O'Neill v. G. N. R. R. Co., 82 N. W. 1086, the Supreme Court of Minnesota considered the question of concurrent negligence. In this it was claimed that plaintiff was injured by leaving a long spike or bolt in a timber and that the leaving of the spike in the timber was due to the negligence of a fellow servant. The court held that plaintiff was a man of experience, that he did not know of the protruding bolt that caused the accident, but that he did know the manner of conducting the work in which he was engaged and the peculiar dangers that arise from the demolition of the portion of the bridge structure which was being taken apart and removed, and that these dangers were obvious to anyone who could use his senses and that he assumes the risks in connection with the other hazards of the undertaking in which he was engaged of the negligence of a fellow servant working with him.

THE PLAINTIFF ASSUMES THE RISKS OF DEFECTS THAT ARE OPEN AND OBVIOUS. HE ASSUMES THE RISK OF A FELLOW SERVANT'S NEGLIGENT ACTS. WHEN THESE TWO CONCUR HE NATURALLY ASSUMES THEM BOTH.

The evidence shows that loads of lumber were apt to fall over on a smooth track and without any negligence on the part of the employer. There nec-

essarily was some distance between the edge of the rails on the transfer car and the end of the rails on the transfer platform. This opening, together with the fact that the transfer car was movable, would cause some jar to the loads as they went upon the transfer car. Even if the plaintiff had not known of the unevenness of the track it seems he was guilty of contributory negligence in assuming the position he did with his back to the load when the truck was being moved from the transfer platform onto the car. How much more conclusive is his contributory negligence when it is taken into consideration the fact that he knew of the unevenness of the track and could, or should have known of the absence of the crosspieces omitted therefrom by a fellow servant, and when he was working at the side of said load in violation of the rules and with his back to the load, not only in violation of the rules, but in violation of the dictates of reasoning that a man should use to avoid injury to himself. It is not shown that crosspieces would have prevented the load from falling had they been in the load, and we cannot see under any view of the evidence in this case where the plaintiff has alleged or proven a cause of action, and respectfully submit that the lower court could have done

nothing else under the evidence and pleadings as they existed but to have sustained the motion of the defendant for an instructed verdict.

Respectfully submitted,

RALPH S. NELSON,

Coeur d'Alene, Idaho.

Attorney for Defendant in
Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OLGA SUNDIN, and MARGUERITE SUNDIN,
IVER SUNDIN, and EUGENE SUNDIN,
Minors, by OLGA SUNDIN, their guardian,
Ad Litem,

Plaintiffs in Error.

vs.

EDWARD RUTLEDGE TIMBER COMPANY,
a corporation,

Defendant in Error.

Petition For Rehearing By Defendant In Error

*Upon Writ of Error From the United States District
Court for the District of Idaho,
Northern Division.*

RALPH S. NELSON,
Coeur d'Alene, Idaho.
*Attorney for Defendant in
Error.*

FILED
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PETITION FOR REHEARING BY DEFENDANT IN ERROR.

The defendant in error respectfully moves the court and petitions that a rehearing of the above entitled cause be granted for the reasons hereinafter specifically set forth and numbered.

FOREWORD.

We very much dislike to take up the court's time as we know it is very busy, but since from its opinion in this case it is so apparent that it has misunderstood the facts, and therefore applied clearly erroneous principles of law, we are asking a rehearing that the court may prevent the great confusion that is certain to follow the establishment of the opinion as it now appears in this case.

STATEMENT OF FACTS.

To refreshen the court's memory as to the facts in this case and the questions involved we make the following brief statement of facts:

The deceased was assisting in moving a car two feet high and four feet wide, upon which was piled eight tiers of lumber, six inches wide and one inch thick. The tiers were about fifty boards high, making the top of the load something like six feet from the floor. It was the custom for a fellow-servant when piling the lumber on the car, when the load was getting uneven, to place from two to four laths in the load as cross-pieces to bind the load firm and well balanced (tr. p. 35). No cross-pieces were in this particular load that was being moved at the time of the accident. The track at the place of the accident had become uneven, the ends of one rail stand-

ing an inch and a half higher than the rails adjoining it. In moving the car from the lower rails onto the higher rails two or three attempts had to be made owing to the obstruction, and on account of the shock about one fourth of the load slid off onto deceased who had his back to the load.

The complaint alleges that deceased knew of the unevenness of the track but did not know of the absence of cross-pieces in this particular load, and alleges that the load would not have fallen had the cross-pieces been in the load, even in going over the uneven track. There was no complaint that defendant furnished defective appliances or failed to furnish sufficient appliances. The theory relied on by the plaintiff was that the defendant failed to furnish a safe place to work owing to the concurring negligence of the defendant in furnishing a defective track and of the negligence of a fellow-servant in piling the load in a defective manner, in that he did not put in to said load the laths or cross-pieces.

The lower court directed a verdict for the defendant. The court has reversed the case.

While we think that all of our eight reasons for rehearing hereinafter set forth are well taken, we especially call the court's attention to the reasons set forth in paragraphs one and four of our reasons why the rehearing should be granted.

GROUND'S FOR REHEARING.

We respectfully state that the court should grant us a rehearing of this case for the following reasons, to-wit:

I.

The court in reversing the case inadvertently overlooked the fact that there was no evidence whatever that substantiates paragraph fourteen of plaintiff's complaint, which is as follows:

“That if said binders or cross-pieces had been put in said load the load of lumber thereon could not and would not have fallen over and upon said Alex Sundin causing his injury and death hereinbefore mentioned.”

The complaint alleges the accident was caused by the unevenness of the track and the absence of cross-pieces, and that deceased knew of the unevenness of the track, but did not know of the absence of cross-pieces, and that if the cross-pieces had been in the load it could have been safely moved even over the obstruction. Therefore to make out the plaintiff's cause of action it was necessary for them to prove *that if the cross-pieces had been in the load it would not have fallen*. There is no evidence whatever in the record to prove this necessary element of plaintiff's complaint.

II.

It appears from the court's opinion that its reversal of the lower court was upon a theory of law not set forth in plaintiff's complaint or relied upon in the trial of the cause in the court below, and which was never brought to the attention of the lower court, namely, that the cross-pieces were instrumentalities and appliances and as such a part of the car furnished by defendant, and that defendant was guilty of negligence in furnishing deceased with defective appliances and instrumentalities.

III.

The court erred in holding the defendant guilty of negligence in furnishing defective appliances and instrumentalities, to-wit, the cross-pieces as part of the car, when it appears from plaintiff's complaint and from the evidence in the case that the negligence complained of and relied upon by the plaintiff in error was not a failure to furnish reasonably safe appliances or in furnishing defective appliances but negligence in loading the load in an improper manner, in that the cross-pieces were not placed in this particular load.

IV.

The court erred in holding that the cases set forth in its opinion, and hereinafter mentioned, were

in point, because in those cases the courts held defendant liable in furnishing *defective appliances* and instrumentalities, while in this case there was no claim and no evidence that the cross-pieces were in any manner *insufficient* or *defective* or that the car was defective.

Port Blakely Mill Co. v. Garrett, 97 Fed. 537;

Penna. R. R. Company v. La Rue, 81 Fed. 148.

In the above cases there was defective construction. In this case there was none alleged or proven.

V.

The court overlooked or misunderstood the evidence as it appears in the transcript when it says: "There is no evidence that a load properly bound with strips of lath was in danger of collapsing or had ever fallen from a car."

VI.

The court overlooked or misunderstood the evidence as it appears in the transcript when it says: "There was no evidence that a load, such as this that fell upon Sundin, had ever before been piled upon any car without the use of cross-pieces."

VII.

In the court's opinion there are contradictory and conflicting statements which show the court inadvertently overlooked or misunderstood the evidence when it says: "There is no evidence that the loads properly bound with strips were in danger of collapsing," and that "there was no evidence that ever before had a load been built without cross-pieces"; and then further finds that "the foreman had warned the men (including plaintiff) to keep away from the loads because they were unsafe, when he saw that a load was not piled straight and in such a way as not to be safe," because it follows that if the foreman warned the men to keep away from the load because they were unsafe and if there was no evidence that ever before had a load been built without cross-pieces, it would necessarily follow that there was evidence that loads properly bound with strips were in danger of collapsing.

VIII.

It is apparent from the statements in the court's opinion, wherein it holds that the question of assumption of risk should have gone to the jury, that the court overlooked or entirely misunderstood the evidence as it appears in the transcript, and misunderstood the manner in which the work was being carried on at the time of the accident, in that it appears

undisputedly from the plaintiff's testimony, (a) that the gang of which Sundin was a member passed upon the question when a load should be moved; and (b) in that the court finds there were loaded cars on both sides of the load which caused the injury, and at the same time holds that the foreman had as good an opportunity to see the load as the deceased and to see whether or not there were cross-pieces in the load.

ARGUMENT AND AUTHORITIES.

I.

THE COURT IN REVERSING THIS CASE INADVERTENTLY OVERLOOKED THE FACT THAT THERE WAS NO EVIDENCE WHATSOEVER TO SUBSTANTIATE PARAGRAPH FOURTEEN OF PLAINTIFF'S COMPLAINT, WHICH IS AS FOLLOWS:

“THAT IF SAID BINDERS OR CROSS-PIECES HAD BEEN PUT IN SAID LOAD, THE SAID LOAD OF LUMBER THEREON COULD NOT AND WOULD NOT HAVE FALLEN OVER AND UPON ALEX SUNDIN, CAUSING HIS INJURY AND DEATH HEREINAFTER MENTIONED.”

We feel that we are partially to blame for not bringing this point more clearly to the Court's attention. The negligence alleged was a failure to furnish a safe place in which to work because of the two

following grounds: (1) That in loading the load no cross-pieces or lath were used, and (2) that the track furnished by defendant was uneven.

The complaint alleges deceased knew of the uneven track but that owing to the absence of the cross-pieces of lath part of the load fell and that “*if the cross-pieces had been in the load it would not have fallen.*”

The plaintiff to make out a case had to prove that “*if the cross-pieces had been in the load it would not have fallen.*” This fact is true even under the court’s view of the case that the laths were a part of the appliances furnished, to-wit: a part of the car as the standards were a part of the car, in the case of *Port Blakely M. Co. v. Garrett*, 97 Fed. 537.

There is not one word of evidence in the transcript to prove that if the cross-pieces had been in the load it would not have fallen, or that it could have withstood the jars it received when it went over the raised end of the rail without falling.

It will be noticed that the complaint alleged deceased knew of the uneven track but that notwithstanding such unevenness if the cross-pieces had been in the load it “*could then be moved in safety in the manner in which it was necessary to be moved, and*

in the manner it was being moved, at the time of said collapsing.”

Under the plaintiff's theory and under the doctrine of the Garrett case, if the deceased knew of the unevenness of the track, and the accident would have happened just the same if the lath had been in the load, he would have no case. If the lath would not have prevented the load from falling then of course he did not rely on them being in the load and would certainly have assumed the risk. The fact that plaintiffs set up in their complaint that the load would not have fallen if the lath had been present shows the necessity of this element in making out their cause of action. In the proof they entirely failed and the lower court was correct in instructing a verdict for defendant.

For the reasons alone set out above the court should grant a rehearing of the above entitled case, as the lower court was clearly correct in instructing a verdict for defendant.

III.

THE COURT ERRED IN HOLDING THE DEFENDANT GUILTY OF NEGLIGENCE IN FURNISHING DEFECTIVE APPLIANCES AND INSTRUMENTALITIES, TO-WIT, THE CROSS-PIECES AS PART OF THE CAR,

WHEN IT APPEARS FROM PLAINTIFF'S COMPLAINT AND FROM THE EVIDENCE IN THE CASE THAT THE NEGLIGENCE COMPLAINED OF AND RELIED UPON BY THE PLAINTIFF IN ERROR WAS NOT A FAILURE TO FURNISH REASONABLY SAFE APPLIANCES, OR IN FURNISHING DEFECTIVE APPLIANCES BUT NEGLIGENCE IN LOADING THE LOAD IN A PROPER MANNER, IN THAT THE CROSS-PIECES WERE NOT PLACED IN THIS PARTICULAR LOAD.

THE EXAMPLE OF THE LOAD OF HAY.

This court in its opinion refers to the fact that the lower court in instructing the jury to return a verdict for the defendant used for illustration, the case of two workmen engaged in loading hay upon a wagon, and refers especially to the fact that the court below said that the employer could not be responsible because he could not anticipate that one of the men was going to be negligent. This court also in its opinion says that it cannot agree that the illustration presents the situation found in the record. The illustration was probably somewhat meager, but it must be apparent that the lower court cited it as an example to the jury when he took the case away from them, simply to explain why the case was being taken away from them. The jury would not have un-

derstood an argument on the question as to who were fellow-servants and the court probably did not feel called upon to go into the matter fully. We will hereinafter show how the court's example was in point.

The failure to put in the cross-pieces was a defect in the manner of loading the load and not neglect of the employer in providing defective appliances or instrumentalities. We desire to emphasize emphatically that there was no complaint or evidence anywhere in the record that the defendant was carrying on its work in a careless or negligent manner or that the cross-pieces furnished were insufficient in number or in any manner defective. In a load of 12-inch boards no cross-pieces whatever were necessary or were used. (Tr. p. 100). In a load of six inch lumber as in the case at bar from two to six pieces of lath were used simply to make the load level and solid, and to keep the load or any part of it from falling. (Tr. p. 96). If the load as it was being built appeared to be level only two cross-pieces would be put in the entire load. If the boards were uneven and the load appeared not to be straight as high as six cross-pieces would be used. The number of laths or cross-pieces depended upon the manner in which a load was going up. Their presence or absence depended upon the manner in which the load was being built.

The lumber in question was wet green lumber, unplanned and direct from the mill. Its rough sides tended to bind it together. The cross-pieces also tended to bind it together. The fact that the rough surface of the boards and the cross-pieces in the loads answered the purpose of keeping the load from falling did not make the rough surfaced boards or the cross-pieces instrumentalities or appliances or a part of the equipment of the car, as the standards did in the Garrett case.

Following out the Court's conclusion as expressed in its opinion in this case, that the lath was part of the equipment, that is a part of the car furnished by the defendant as the standard in the Garrett case, if an employee was moving some rock, gravel and soil on a flat truck, car, wheel barrow or wagon, and as was his custom, did not use any sides, whatsoever, but would place along the sides of the wagon bed the larger rocks to hold the other parts of the load solid, the rocks would be a part of the equipment or appliances furnished by the master. It seems to us that the court has confused the manner of loading which was the negligence alleged by the plaintiff with the failure to furnish a safe car as was the question in the Garrett case.

The evidence shows that the defendant sawed its boards in all lengths. Some of the boards were sawed in four foot lengths, and the cars on which the boards were piled were four feet wide. Suppose the transfer men in loading one of the cars with four foot lumber in two or three places in the load would put some of the four foot boards crosswise of the load so as to make the load more secure than it would be if all the boards were placed lengthwise, would the court hold that the boards that were put in crosswise of the load were a part of the equipment or appliances, in fact a part of the car that the defendant furnished, and that the boards that were placed lengthwise were not a part of the equipment and no part of the car?

It seems to us that since the defendant never used standards or side-pieces on its car, but simply tried to pile the lumber on its car in such a manner as to make it solid, that the court cannot say, in the absence of allegations of furnishing defective appliances, that the laths were defective appliances, or that they were a part of the car.

Taking up the lower court's example of the load of hay, we think it was in point if carried to a logical conclusion in the light of the circumstances in this case. If the farm hand was injured by having one-fourth of a load of hay slide off on to him, and would

sue the farmer, setting up that the hay was caused to slide off by reason of a rough place in the road and on account of the fact that the hay was piled on to the rack in a loose manner, instead of being tied in bundles, as was customary, and that it would not have fallen if tied, and at the trial would show that there was sufficient twine in the field with which to tie the hay, and that a fellow-servant simply omitted to tie the hay in this particular load, we feel satisfied that this court would not hold that the twine furnished the men in the field was a part of the appliance furnished for moving the hay or a part of the wagon, simply because it answered the same purpose as side boards would have done on the hay rack, to-wit: keeping the hay from falling off the load. The defendant might adopt several methods of carrying on his work, such as using twine or lath to bind the load to make it level and in the absence of allegations as to the negligent manner of carrying on his work would not be held liable for failure to furnish safe appliances. Suppose the defendant had been moving a load of lath at the time of the accident. It is common knowledge that laths are bound into bundles of about twenty-five each by means of a piece of twine. If the defendant had been moving a load of lath at the time of the accident and owing to the fact that a co-employee of the plaintiff had failed to securely tie one or more bundles of lath, when suffi-

cient twine had been furnished him and an account of such failure to properly tie the laths, a part of the load of lath had fallen upon the deceased and injured him, would this court have held the defendant liable on account of failure to furnish safe appliances under the authority of the Garrett case, even though the twine answered the same purpose in a way that the standard did on the side car in the Garrett case?

IV.

THE COURT ERRED IN HOLDING THAT THE CASES SET FORTH IN ITS OPINION, AND HEREINAFTER MENTIONED, WERE IN POINT, BECAUSE IN THOSE CASES THE COURTS HELD DEFENDANT LIABLE IN FURNISHING DEFECTIVE APPLIANCES AND INSTRUMENTALITIES, WHILE IN THIS CASE THERE WAS NO CLAIM AND NO EVIDENCE THAT THE CROSS-PIECES WERE IN ANY MANNER INSUFFICIENT OR DEFECTIVE, OR THAT THE CAR WAS DEFECTIVE.

The court in this case apparently decided this case upon the authority of one of its former opinions in the case of Blakely Mill Co. vs. Garrett, 97 Fed. 537. In so deciding the case at bar this court evidently came to the conclusion that cross-pieces or

strips of laths were instrumentalities and as such a part of the equipment of the car as were the standards on the side of a railroad flat car, because they answered the same purpose, to-wit, that of keeping the load from falling off the car. The court cannot claim that the lath were properly a part of the car as were the standards in the Garrett case. In the Garrett case there were iron sockets on the side of the car into which the standards fitted. The standards were as much a part of the car as were the sides of a cattle car or the sides of a coal car. They were supposed to hold the lumber on the car when the load would shift over against it when the train was moving. They had necessarily to be strong. It was proven in the Garrett case that the standards were uniformly used for this purpose of holding the load on the car and had to be very strong and had to be made of oak. It was contended in the Garrett case they were defective in that they were made of a soft wood. It was a contention of original defective construction. There is no contention in this case of defective construction or defective instrumentalities. The fact that the lath might incidently answer the purpose of keeping the load from falling would not make them instrumentalities or a part of the car as were the standards. The defendant was using a different manner of loading his load. He

was using strips of lath to make his load level or to bind it and was not using any standards whatever. If it were negligent in not using such standards that question is not in this case. Now if the laths simply bound the load as would be the case by placing part of the load itself crosswise, that could not make the strips instrumentalities or a part of the equipment of the car. It seems beyond dispute that the strips were not such instrumentalities as to be a part of the car. Now if in the Garrett case a fellow employee had so used the car as to run it upon Garrett and injured him the court would have said since the instrumentality, that is the car, including the standard, was reasonably safe, therefore the employer is not liable, and in the case at bar the fellow employee having been furnished the strips the defendant should not be liable. There is, we repeat, no question here, as there is in the Garrett case, of furnishing defectively constructed appliances. If the court holds that the lath were instrumentalities, they were separate instrumentalities from the car as much as a crowbar would be by which a load might be raised onto a car. If there was a failure to use lath not defective it was a detail of the work such as not to make the master liable.

Bundles of lath were taken from the same mill on the same cars by the same men. They

are wrapped in bundles by twine and placed on cars no standards are used. Is the twine around the lath an instrumentality and as such a part of the car. The twine answers the same purpose in a way that the standards do and the lath do in a load of lumber, still they are not a part of the car. As was shown, the defendant cut its boards into all lengths. Suppose the transfer men in loading four foot lumber every so often placed a layer or two, or three layers, cross-wise as they often did, the cars being four feet wide, would this court hold that the boards placed lengthwise were not instrumentalities, but that the boards placed crosswise were instrumentalities and as such a part of the car?

There is no question in the Garrett case of an improper manner of loading the car and that case is not in point. That was a case of improper construction of a car. That case is cited generally by other courts and commented upon under the heading of duty of railroads to furnish safe cars. It was decided upon this one theory alone.

The Garrett case is cited in the case of Lane Brothers Company v. Couch, 192 Fed. 509, by the Circuit Court of Appeals, Sixth Circuit, under the heading "Equipment of Railroad Cars." The court says in its opinion, after discussing the question of *res ipsa loquitur* and contributory negligence, as follows:

“These considerations aside there remains the question of whether a matter of providing this car with side standards pertained to the employer’s duty to furnish a suitable car properly constructed and equipped, and so to a nondelegable duty, or whether it pertains to the loading of the car, and so would bring into the action the fellow servant rule. If the former, the case was properly submitted to the jury; *it might be otherwise if the case was of the latter class*. If we had to do only with the matter of staying the tops, or *respective* opposite standards, *by wire or by cross-pieces, that might involve only the loading operations*; but this record is not so shaped as to present that question by itself.”

Of course in that case it was proven that it was necessary to have sides on a car. Such is not a fact in the case at bar. As a matter of fact in this case it was alleged that it was usual and customary to operate cars without such sides. It was not necessary to have any sides on the cars whatever. It was not necessary with most of the lumber to even have cross-pieces. It was usual when a load was built of six inch boards to simply put in a few lath every once in a while when the load would become uneven or shaky as it was built up. It all depends on the manner in which that particular load was being loaded whether cross-pieces were used or not and how many cross-pieces were used. There was no proof or allegation that the cross-pieces were defective or insufficient. The complaint was simply that the transfer-shed-men failed to put in the cross-pieces in

the load when they were building it, and therefore left it shaky.

The court in its opinion cites the case of Railroad Company v. LaRue, 81 Fed. 148, which seems to have been the guiding authority of this court in the Garrett case. The LaRue case simply holds that the standards of a gondola car are a part of the equipment and that it is the duty of the employer to furnish reasonably safe equipment. Of course the question of fellow-servant does not enter into either case when it is a question of the master failing to furnish safe appliances, and the question of fellow-servant therefore did not enter into the LaRue case. The LaRue case has been cited in 146 Fed. p. 29 by the Circuit Court of Appeals, third circuit, and in a decision written by Justice Gray he discusses the question and distinguishes between the question of safe appliances and the manner of loading cars. Justice Gray says:

“The counsel for appellee apparently rely upon the opinion of this court, in the case of Penna. R. R. Co. v. La Rue, 81 Fed. 148, 27 C. C. A. 363. We do not think, however, that the ratio decidendi of that case conflicts with that of our opinion in the present case. The injuries inflicted upon a locomotive fireman in that case, were due to the shifting of large pieces from the top of a car loaded with lumber. The car was a gondola car and the lumber was held in place by wooden standards along the sides. A gondola car, when used as a lumber car, must

be equipped as such, and the standards necessary for this equipment must be sufficient for their purpose, that is, long enough and strong enough to hold the lumber piled upon the car in place. These standards are part of the permanent equipment of a car so used, and it was undoubtedly the duty of the defendant company, as being a master's duty, to see that the car in this respect was fit for the purposes for which it was used, by a proper equipment of standards. Some of these standards were of hemlock, instead of oak, as they ought to have been, and gave way to the pressure of the lumber, allowing some of the sticks to protrude, which occasioned the injury to the plaintiff. A defect in the standards or equipment of the car, was a defect in the car itself, as a lumber car, and was due to the negligence of the defendant company as much as would have been a defect in a box car that allowed any portion of its load to escape, to the injury of one situated as the plaintiff in the case was. Judge Anderson, in delivering the opinion of the court, says:

“In the present case, the negligence which caused the mischief was not the improper or insecure loading of the car, for in this regard there was no fault, nor was this a case of the negligent use by the defendant's employees of safe appliances. The ground of complaint here is, that the defendant failed in the positive duty it owed to the plaintiff to equip the car with reasonably safe appliances for the service in which it was employed. * * * * Its whole duty to the plaintiff was not fulfilled, short of the actual proper equipment of the car.”

“In another place, the learned judge says:

“In the case of a low sided gondola car employed in the transportation of lumber, side

standards to keep the load in place * * * are appliances necessary for the proper equipment of the car, and as essential to the safe transportation of the load as is a proper car body.”

We submit that in this case this court can not logically without allegations or proof to that effect hold that the lath were a part of the equipment of the car.

If the lath were appliances at all they were separate from the car and were not defective as were the standards in the Garrett case. If they were separate appliances and being furnished by the master the failure on the part of an employee to use them on one occasion would be such a detail of the work as not to make the master liable.

V.

THE COURT IN ITS OPINION SAYS THAT THE QUESTION OF ASSUMPTION OF RISK AND OF CONTRIBUTORY NEGLIGENCE SHOULD HAVE BEEN SUBMITTED TO THE JURY AND FURTHER SAYS:

“THERE WAS NO EVIDENCE THAT A LOAD PROPERLY BOUND WITH STRIPS OF LATH WAS IN DANGER OF COLLAPSING OR HAD EVER FALLEN FROM THE CAR.”

Before quoting all of the evidence introduced by the plaintiff relative to this question we desire to call

the court's attention to the facts, first that only about 100 boards fell from the car at the time of the accident in question and there were eight tiers of from 50 to 60 boards on the car or from 400 to 480 boards. The plaintiff's testimony as to the part of the load that fell and caused the death of the deceased was as follows (Tr. pg. 38):

Q. About how much of the lumber fell from off that load, Mr. Moe?

A. I didn't count them, but it must have been something about 100 pieces or a little more probably.

In the second place we desire to call the court's attention that not only was there evidence that a load properly bound would fall, but that plaintiff's own witnesses showed that the deceased was a man of experience; that a man of experience is watching for loads to fall and that notwithstanding the fact that the ordinary number of cross-pieces were in the load, such loads would and did frequently fall. (Tr. pg. 101).

THE COURT: Q. I want to ask the witness a question. You spoke of warning these men (including deceased) from time to time as you saw that a load did not seem to be quite safe. Is that more or less of a common thing, that a load would not be safe?

A. Yes, sir, so far as I have known in lumber yards, it is a common thing that some loads are not safe.

THE COURT: Q. Why wouldn't they be safe? I mean what would be the reason for the peril? Can you give an illustration?

A. Well, some times the chainers don't pay enough attention to loading them straight and nice, and sometimes there will be a rush for a little bit, for a few minutes, and lots of reasons and once in a while there will be a load that is not safe.

MR. NELSON: Q. Is it not a fact that always above the last cross-piece there are a number of pieces that are not held by anything?

A. There should be, but sometimes there will be only a few boards, some times. If the transfer men think a load is big enough they will take it out even though the cross-pieces are right on the top.

Q. But usually there are a number of tiers above the last cross-piece?

A. There should be and usually is.

Q. Is it not a fact that a board may fall off no matter how well the load may be loaded?

A. Yes, it might fall off no matter how they were loaded. I have seen that.

Q. And a tier of a load or the top of two tiers or three tiers might slide off the load.

A. I have seen that too.

Q. And that is a thing that may happen in any yard is it not?

A. Yes, it might happen in one yard as well as another.

Q. And that is one of the things that a man of experience moving trucks guards against, it is not?

A. Yes, it is the same as any other kind of work, it don't make any difference what it is, they have got to look for something.

MR. PLUMMER: Q. Mr. Moe, Counsel asked you if some times lumber did not fall from off these cars, now in moving these cars of lumber of the kind that was being moved when Sundin was hurt, and the distance it was being moved before it came to this end of the track that we claim was out of repair, before it came to that, and being shoved along as has been described here what would cause the lumber to fall off going that distance under those circumstances?

A. I could not tell.

Q. Do you know of anything.

A. No.

MR. NELSON: Q. But it will sometimes do it won't it, Mr. Moe?

A. Certainly it will.

It must be evident from the foregoing testimony that there was evidence that a load properly bound with strips of lath was in danger of collapsing. The evidence shows that in some loads similar to the one in question only two cross-pieces are used. Suppose these cross-pieces were in about the middle of the load we would have eight tiers of six inch boards piled side by side, twenty-five boards in height above the cross-pieces. Can the court not say as a matter beyond dispute in the light of the testimony in this case that the tops of such tiers or the entire side tiers of such a load might not fall off? The record is clear that Sundin and his fellow servants were warned by the foreman Moe to keep away from the sides of the cars when they appeared dangerous. The court has said that there was no evidence that in any other load prior to this time had the cross-pieces been omitted. There is therefore only one conclusion and that is that parts of the loads would fall as testified to by Mr. Moe, (page 101 of the transcript) no matter how they were piled or how many cross-pieces or laths were put into them.

VI.

AS TO ASSIGNMENTS OF ERROR SIX AND SEVEN.

As these two assignments of error are so nearly alike we will discuss them together. The court says in its opinion as a reason why the question of assumption of risk should go to the jury, that "there was no evidence that the loads properly bound with strips were in danger of collapsing or had ever fallen," and also said that there was no evidence that such a load as this that fell on Sundin had ever before been piled on a car without the use of cross-pieces. The court then further states that the evidence shows that the foreman when he saw a load that was not piled straight and was in such a way as not to be safe, that he warned the men (including deceased) to keep away from the side of it.

It must appear to the court that the above statements are absolutely conflicting. The evidence shows that no matter how careful the load might be piled, and notwithstanding the usual amount of cross-pieces that were put in the load, still they would fall. There can be no doubt that if the foreman warned the men to keep away from the side of the loads because they were unsafe for the reason that they were not piled straight, and there was no evidence

that ever before had a load been built without cross-pieces, it would necessarily follow that there was evidence that loads properly bound with strips were in danger of collapsing.

VIII.

IT IS APPARENT FROM THE STATEMENT IN THE COURT'S OPINION, WHEREIN IT HOLDS THAT THE QUESTION OF ASSUMPTION OF RISK SHOULD HAVE GONE TO THE JURY, THAT THE COURT OVERLOOKED OR ENTIRELY MISUNDERSTOOD THE EVIDENCE AS IT APPEARS IN THE TRANSCRIPT, AND MISUNDERSTOOD THE MANNER IN WHICH THE WORK WAS BEING CARRIED ON AT THE TIME OF THE ACCIDENT, IN THAT IT APPEARS UNDISPUTEDLY FROM THE PLAINTIFF'S TESTIMONY, (a) THAT THE GANG OF WHICH SUNDIN WAS A MEMBER PASSED UPON THE QUESTION WHEN A LOAD SHOULD BE MOVED; AND (b) IN THAT THE COURT FINDS THERE WERE LOADS ON BOTH SIDES OF THE LOAD WHICH CAUSED THE INJURY, AND AT THE SAME TIME HOLDS THAT THE FOREMAN HAD AS GOOD AN OPPORUNITY TO SEE THE LOAD AS THE DECEASED AND

TO SEE WHETHER OR NOT THERE WERE CROSS-PIECES IN THE LOAD.

It appears from statements in the court's opinion that the court has misunderstood the evidence, because at page 78 of the transcript it shows that the gang of which Sundin was a member passed upon the question as to when a load was to be taken out, and that at the time of the accident the foreman, Mr. Moe, was sixty feet away from the car (tr. pg. 98 and 99). The court holds that he had as good an opportunity to see the car as deceased. If he did the court necessarily holds that there was no car to the west side of the car in question, because Mr. Moe, the foreman, was sixty feet west of the car at the time of the accident. If there was no car on the west side of the car in question, then the deceased was under no necessity or requirement, even under his theory of the case, to go along side of the load.

From the uncontradicted statements appearing in the opinion and from the apparent misunderstanding of facts of this case, we feel in justice to the defendant in error and to the lower court that a rehearing should be granted. We feel that if this opinion is permitted to stand great confusion among the litigants of this circuit will be brought about because it is now the settled law that where the master furnishes reasonably safe appliances and a co-em-

ployee in a detail of the work omits to use such appliances, or uses them in a negligent manner, that defendant is not liable.

We respectfully submit in conclusion that the Garrett and La Rue cases do not support the conclusion reached by the court in this case. The lath in the case at bar certainly cannot be held to be a part of the car. If they were not a part of the car, then in the most favorable view possible to the plaintiff in error they were separate appliances furnished by the master. The evidence shows in this case that there were sufficient appliances on hand at the time of the accident (tr. p. 38) and that they were not defective in any manner, and that a co-employee of plaintiff carelessly failed to use the same. In addition to this clear reason for a rehearing in this case there appears the other equally clear ground for a rehearing that there was no evidence whatever introduced in the lower court that even though there had been cross-pieces in the load in question the accident would not have happened.

DETAILS OF THE WORK.

In this case there being no allegation that the car was defective or that the cross-pieces were defective or that the lath were part of the equipment of the car, it necessarily follows that the lath were put in the load simply as a part of the system or man-

ner of work adopted by the employer. In some loads no cross-pieces were placed, in other loads as many as six cross-pieces would be used. The placing of these cross-pieces or lath in a load depended upon the judgment of the person loading the load and was a detail of the work that the master could not possibly look after himself, but had a right to delegate to a competent employee. This doctrine has been built up because it is evident that an employer cannot oversee every detail of his work or he would be required to have in every case a man watching every man at work. LaBatt on Master and Servant says, in paragraph 1533:

“It is well settled that, where the master has provided an adequate and readily accessible stock of suitable appliances in good condition, from which to make a selection, and the imperfection of an instrumentality selected therefrom was, or ought to have been, apparent to the servant who selected it, the master cannot be held responsible for injuries which are sustained by the use of that instrumentality, whether the sufferer be the servant himself who made the selection, or a coemployee.”

Many cases are cited to sustain this rule of law. The author also says in paragraph 1534:

“Another kind of dereliction of duty which is regarded as characteristic of a servant, and not of the master, is that which consists in the failure of a fellow servant to make use of suitable appliances furnished by the master for the work in hand.”

Many instances are cited by the above author and they are exactly similar to this case. In this case, there is no complaint as to the incompetency of the fellow servant or as to the manner of doing the work. The complaint is simply as to the detail of the work, to-wit, that a fellow-servant omitted putting a lath, which was no part of the equipment of the car, into the load.

The evidence shows that there were sixty-eight cars on one side of the transfer shed and seventy on the other, and under the decision of this court as it now stands this employer would be required to have as many inspectors as it has men working at loading these cars, because if he did not watch every detail of the work he would not know whether the lath were inserted, when in the judgment of the employee they should be inserted in a load.

In conclusion we respectfully submit that the court decided this case upon the theory that defective appliances were furnished the deceased when in fact there was no allegation in the pleadings and no evidence to suggest such a conclusion. The court evidently held that the lath were a part of the equipment of the car when the pleading and evidence will not sustain such a holding. If the lath were separate appliances so that the car was not defective in equip-

ment and construction the Garrett and La Rue cases do not apply. If the lath were separate appliances from the car the failure to insert them was a detail of the work and certainly there was no evidence that the accident would not have happened even though the cross-pieces had been in the load, therefore we respectfully ask that the court grant us a rehearing in this case.

Respectfully submitted,

RALPH S. NELSON,
Atty. for Defendant in Error.

No.

3050

United States
Circuit Court of Appeals
For the Ninth Circuit.

LOUIS M. COLE,

Appellant,

VS.

ED. G. HOOKSTRATTEN CIGAR COMPANY,
a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

Filed

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No.

United States
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LOUIS M. COLE,

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	PAGE
Answer of Ed. G. Hookstratten Cigar Co.....	9
Assignments of Error.....	60
Bond on Appeal.....	63
Bill of Complaint.....	3
Citation	2
Exhibits:	
Plaintiff's Exhibit No. 1—Cole Reissued Patent	
No. 14,000.....	32
Defendants' Exhibit A—File History of Original Cole Patent No. 1,054,826.....	33
Defendants' Exhibit B—File History of Reissued Cole Patent No. 14,000.....	45
Defendants' Exhibit C—Patent No. 371,144.	
Oct. 4, 1887. F. Koewing.....	58
Defendants' Exhibit D—Patent No. 709,464.	
Sept. 23, 1902. Broach & Goodrich.....	58
Defendants' Exhibit E—Patent No. 643,772.	
Feb. 20, 1900, Mayo.....	58
Defendants' Exhibit F—Patent No. 418,122.	
Dec. 24, 1889. Glick.....	58
Defendants' Exhibit G—Patent No. 1,004,055.	
Sept. 26, 1911. Martin & Fietsch.....	58
Defendants' Exhibit H—Patent No. 814,592.	
Mch. 6, 1906. H. B. Duane.....	58

	PAGE
Defendants' Exhibit I—Patent No. 566,761.	
Sept. 1, 1896. Hosmer.....	58
Defendants' Exhibit J—Patent No. 589,406.	
Sept. 7, 1897. Braly.....	58
Defendants' Exhibit K—Borden's Star Milk	
Label	58
Defendants' Exhibit L—Colgate & Co. Oc-	
tagon Label.....	58
Defendants' Exhibit M—Kirkman's Borax Soap	
Label	58
Defendants' Exhibit N—Babbitt Soap Label....	58
Defendants' Exhibit O—Proctor & Gamble Star	
Soap Label.....	58
Defendants' Exhibit P—Proctor & Gamble Der-	
by Soap Label.....	58
Defendants' Exhibit Q—Proctor & Gamble Gold	
Soap Label.....	58
Defendants' Exhibit R—Proctor & Gamble Satin	
Gloss Label.....	58
Defendants' Exhibit S—Swift & Co. Classic Soap	
Label	58
Defendants' Exhibit T—Chewing Gum Circular	
Published by Zeno Mfg. Co.....	58
Stipulated Evidence—Zeno Chewing Gum Label	58
Final Decree.....	17
Names and Addresses of Attorneys.....	1
Opinion of Court.....	19
Order Allowing Appeal.....	62
Petition for Order Allowing Appeal.....	59
Praecepte	66
Statement of Proceedings and Evidence on Appeal	26
Stipulation (as to Evidence).....	22

Names and Addresses of Attorneys.

For Appellant:

JOSEPH F. WESTALL, Esq., 516 Trust & Savings Building, Los Angeles, California.

For Appellee:

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*In the United States District Court, Southern District
of California, Southern Division.*

LOUIS M. COLE,

Plaintiff,

vs.

ED. G. HOOKSTRATTEN CIGAR COMPANY,
a Corporation,

Defendant.

In Equity No. C-3.

Citation.

United States of America—ss.

To Ed. G. Hookstratten Cigar Company, a Corporation,
Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the state of California, on the 2nd day of July, 1917, pursuant to an order allowing an appeal in the clerk's office of the District Court of the United States for the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, in that certain suit in equity numbered C-3, wherein you are defendant and appellee, and Louis M. Cole is the plaintiff and appellant, to show cause, if any there be, why the order or decree of said court made and entered on the 4th day of December, 1916, against said appellant in said order allowing appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Benjamin F. Bledsoe, United States District Judge, for the Southern District of

California, of the Ninth Judicial Circuit, this 4th day of June, 1917.

BENJAMIN F. BLEDSOE,
United States District Judge, for the Southern District
of California.

Due service and receipt of a copy of the within citation is hereby admitted this 6 day of June, 1917.

ED. G. HOOKSTRATTEN CIGAR CO., Inc.

[Endorsed]: Original. No. In Equity C-3. In the District Court of the United States, in and for the Southern District of California, Southern Division. Louis M. Cole, complainant, vs. Ed. G. Hookstratten Cigar Company, a corporation, defendant. Citation. Filed June 8, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Westall and Wallace, attorneys at law, Suite 516 Trust & Savings Bldg., Los Angeles, F 5683, Main 8508, attorneys for plaintiff.

*In the District Court of the United States for the
Southern District of California, Southern Division.*

LOUIS M. COLE,

Plaintiff,

vs.

ED. G. HOOKSTRATTEN CIGAR COMPANY
(a Corporation),

Defendant.

No. Equity C 3.

Bill of Complaint.

To the Judges of the District Court of the United
States, Southern District of California:

Your orator, Louis M. Cole, a citizen of the United States, and of the state of California, residing in the city of Los Angeles, in said state, brings this his bill of complaint against the Ed. G. Hookstratten Cigar Company, a corporation, duly organized and existing under and by virtue of the laws of the state of California, having its principal place of business, and carrying on business, in the city of Los Angeles, state of California, and a citizen of said state, and, thereupon your orator complains and says:

I.

That the grounds upon which the court's jurisdiction depends in this cause is that this is a suit in equity arising under the patent laws of the United States.

II.

That heretofore and prior to the 8th day of August, 1911, your orator, Louis M. Cole, was the original, first and sole inventor of a certain new and useful label not known or used by others before his invention or discovery thereof, and not patented or described in any printed publication in the United States of America, or in any foreign country before his invention or discovery thereof, or more than two years prior to his application for letters patent thereon in the United States, and not in public use or on sale in the United States of America for more than two years prior to his said application for letters patent of the United States thereon, and which had not been abandoned; and your orator avers that no application for any foreign letters patent on said invention has ever been filed by your orator, or any one in privity with him.

III.

That your orator being the original, first and sole inventor of said label, to-wit: on the 8th day of August, 1911, made application in writing in due form of law to the commissioner of patents of the United States of America in accordance with the then existing laws of the United States in such cases made and provided, and complied in all respects with the conditions and requirements of said law; that thereafter such proceedings were duly and regularly had and taken in the matter of such application, that on, to-wit: the 4th day of March, 1913, letters patent of the United States #1,054,826 were duly and regularly granted, issued and delivered by the government of the United States to your orator, whereby there was granted and secured to your orator, his heirs and assigns for the full term of seventeen (17) years from and after the said 4th day of March, 1913, the sole and exclusive right to make, use, and vend the said invention throughout the United States and territories thereof; that the said letters patent were duly issued in due form of law, under the seal of the United States Patent Office, duly signed by the acting commissioner of patents, all as will more fully appear from a certified copy of said original letters patent, which your orator is ready in court to produce as may be directed by this honorable court, and that prior to the grant and issuance of said letters patent all proceedings were taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions.

IV.

That said last mentioned letters patent #1,054,826,

were inoperative by reason of an insufficient and defective specification, and that the error arose through inadvertence, accident and mistake, and without any fraudulent or deceptive intention.

V.

That your orator, thereafter, on the 26th day of December, 1914, filed with the commissioner of patents his petition in due and proper form, for a reissue of said original letters patent #1,054,826, complying in all respects with the law relative to applications for the reissue of letters patent, and among other things accompanying said application for a reissue of said original letters patent with an offer to surrender the same, whereupon the commissioner of patents on the 26th day of October, 1915, caused new letters patent in due and proper form for the same invention, and in accordance with said corrected specification, to be issued to your orator for the unexpired term of said original letters patent (which your orator then and prior thereto surrendered in consideration of the issue of said reissued letters patent), which said reissued letters patent were numbered 14,000 and granted to your orator Louis M. Cole, all as will more fully and at large appear from the original reissued letters patent which your orator is at all times ready and willing in court to produce as may be directed by this honorable court.

VI.

That the trade and public have generally respected and acquiesced in the validity and scope of said reissued letters patent #14,000 and in the exclusive rights of your orator therein and thereunder, and save and except for the infringement thereof by defendant,

as hereinafter set forth, your orator has had and enjoyed the exclusive right of manufacturing, selling and using labels embodying and containing the invention described in and set forth and claimed in said reissued letters patent #14,000, and, but for the wrongful and infringing acts of defendant as hereinafter set forth, your orator would now continue to enjoy the said exclusive rights, and the same would be of great benefit and advantage to your orator.

VII.

Your orator further shows unto Your Honors that notwithstanding the premises, but well knowing the same and without the license and consent of your orator, and in violation of said letters patent and each of them, and of your orator's rights thereunder, the defendant herein, Ed. G. Hookstratten Cigar Company, a corporation, has at divers times since the issuance of said letters patent, in the Southern District of California, Southern Division, to-wit: in the county of Los Angeles, state of California, and elsewhere, used and sold to others to be used, and is now using and selling to others to be used, labels embodying and embracing the invention described, claimed and patented in and by said reissued letters patent, and particularly by claims 2 and 3 thereof, and is infringing upon the exclusive rights secured to your orator by virtue of said letters patent, and that the labels so used and sold by the said defendant were infringements of said letters patent, and each of the labels so used and sold by said defendant contained in it the said patented invention, and that although often requested so to do, defendant refuses to cease and desist from the infringement

aforesaid, and is now using and selling and causing to be used and sold labels containing and embracing said patented invention, and threatens to continue so to do, and will continue so to do unless restrained by this court, and is realizing, as your orator is informed and believes, large gains, profits and advantages, the exact amount of which is unknown to your orator, and your orator prays discovery thereof; and by reason of the premises and the unlawful acts of the defendant aforesaid, your orator has suffered and is suffering great and irreparable injury and damage.

To the end, therefore, that the defendant may, if it can show why your orator should not have the relief herein prayed and may according to the best and utmost of its knowledge, recollection, information and belief, but not under oath (answer under oath being hereby expressly waived), full, true and perfect answer make, to all and singular the matters and things hereinbefore charged; and your orator prays that upon the final hearing and trial of this cause that a perpetual injunction be granted enjoining and restraining the defendant, its agents, servants and employees, and each of them, from making, using or selling, or causing to be made, used or sold, labels, or packages carrying labels embodying the patent invention set forth and described in said reissued letters patent.

That it be ordered, adjudged, and decreed that complainant have and recover from the defendant, its profits realized by the defendant and damages suffered by your orator from and by reason of the infringement by said defendant of said reissued letters patent #14,000, together with the costs of suit, and that plaintiff may

have such other and further relief as to the court shall seem meet.

LOUIS M. COLE,
Plaintiff.

JOSEPH F. WESTALL,
Solicitor and of Counsel for Plaintiff.

[Endorsed]: Original No. C 3 Eq. United States District Court, Southern District of California. Louis M. Cole, plaintiff, vs. Ed. G. Hookstratten Cigar Company (a corporation), defendant. Bill of complaint. Filed Dec. 14, 1915. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Joseph F. Westall, attorney at law, 639 Wesley Roberts Building, Los Angeles, Cal., A 1493, Main 3551.

*In the District Court of the United States, Southern
District of California, Southern Division.*

LOUIS M. COLE,
Plaintiff,

vs.

ED. G. HOOKSTRATTEN CIGAR COMPANY
(a Corporation),
Defendant.

No. Equity C-3.

**Answer of Ed. G. Hookstratten Cigar Company,
Defendant.**

This defendant now and at all times hereafter saving and reserving unto itself all and all manner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and imperfections in said bill of complaint contained, for answer

thereto, or to so much and such parts thereof as it is advised it is material or necessary for it to make answer unto, answering says:

I.

This defendant denies each and every allegation in said bill of complaint contained, except as the same are hereinafter admitted, or specifically answered.

II.

This defendant admits that it is a corporation duly organized and existing under and by virtue of the laws of the state of California, having its principal place of business and carrying on business in the city of Los Angeles, state of California, and a citizen of that state within the meaning of the statute. This defendant denies that prior to the 8th day of August, 1911, Louis M. Cole was the original, first and sole inventor of a certain new and useful label; denies that the said alleged new and useful label was not known or used by others before his alleged invention or discovery and not patented or described in any printed publication in the United States of America, or in any foreign country before his alleged invention or discovery, or more than two years prior to his application for letters patent thereon in the United States and denies that the same was not in public use or on sale in the United States of America for more than two years prior to his said application for letters patent of the United States and denies that the same had not been abandoned.

III.

This defendant admits that on the 8th day of August, 1911, complainant made application in writing to the commissioner of patents of the United States and that

on the 4th day of March, 1913, United States letters patent No. 1,054,826 were issued and delivered to the complainant; but whether or not said application was in due form of law, or applicant complied in all respects with the conditions and requirements of the law, this defendant is not informed and leaves complainant to his proof thereof.

IV.

This defendant denies that letters patent No. 1,054,826 were inoperative by reason of any insufficient and defective specification, or that any error arose through any inadvertence, accident or mistake and without any fraudulent or deceptive intention.

V.

This defendant admits that on the 26th day of December, 1914, complainant filed his petition with the commissioner of patents for a reissue of said original letters patent No. 1,054,826 and that on the 26th day of October, 1915, new letters patent for said alleged invention No. 14,000 was granted to the complainant; but this defendant denies that said complainant complied in all respects with the laws relative to the reissue of letters patent and avers that said reissue letters patent is invalid as a proper reissue.

VI.

This defendant denies that the public have generally respected and acquiesced in the validity and scope of said reissue letters patent No. 14,000 and in the alleged exclusive rights of the complainant therein, save and except for the alleged infringement thereof by this defendant; denies that the complainant has had and enjoyed the exclusive right of manufacturing, selling

and using labels embodying and containing the alleged invention described in and set forth and claimed in said reissue letters patent No. 14,000.

VII.

This defendant denies that it has at divers times since the issuance of said letters patent in the Southern District of California, Southern Division, or elsewhere, used and sold to others to be used and is now using and selling to others to be used, labels embodying and embracing the alleged invention described, claimed and pretended to be patented in and by said reissue letters patent, and particularly by claims 2 and 3 thereof; denies that it is infringing upon all or any exclusive rights secured by the complainant by virtue of said letters patent; denies that the labels used by this defendant are or were infringements of said letters patent and that each of the labels so used and sold by this defendant contained in it the said alleged patented invention; denies that it has often been requested to cease and desist from the alleged infringing acts and that it is now using and selling and causing to be used and sold labels containing and embracing said alleged patented invention, but admits that it will continue to use the labels heretofore used by it until restrained by this honorable court; defendant denies that it is realizing large gains, profits and advantages by reason of any unlawful acts and denies that the complainant has suffered and is suffering great and irreparable injury and damage by reason of its acts.

VIII.

Defendant further answering denies that the said Louis M. Cole was the original and first inventor of

the said pretended or alleged improvements in labels described and claimed in said original letters patent No. 1,054,826, or the reissue thereof No. 14,000, and charges that the said reissue letters patent are void, or if not void are limited in scope for the reason that the principles and combination and every material and substantial part thereof, described and claimed therein as new, were prior to any pretended invention of the same by the said Louis M. Cole, or more than two years prior to the date of his application for either original or reissue letters patent, shown, described and claimed in the following letters patent, to-wit:

No. 131,693, C. Federici-Martorana, Sept. 24, 1872;

No. 139,308, Allan E. Francis, May 27, 1873;

No. 207,813, H. A. Mann, Jr., Sept. 10, 1878;

No. 257,136, J. Livor, Apr. 25, 1882;

No. 260,055, A. Schwarzschild, June 27, 1882;

No. 294,858, D. Dick, Mar. 11, 1884;

No. 355,721, A. Schemmel, Jan. 11, 1887;

No. 371,144, F. Koewing, Oct. 4, 1887;

No. 418,122, B. Glick, Dec. 24, 1889;

No. 527,687, C. Hernsheim, Oct. 16, 1894;

No. 566,761, S. B. Hosmer, Sept. 1, 1896;

No. 578,883, E. U. Kimbark, Mar. 16, 1897;

No. 580,707, J. O'Meara, Apr. 13, 1897;

No. 581,494, H. E. Schwab, Apr. 27, 1897;

No. 589,406, A. & L. Braly, Sept. 7, 1897;

No. 626,568, Rowland & Harrison, June 6, 1899;

No. 643,772, W. E. Mayo, Feb. 20, 1900;

No. 709,464, Broach, *et al.*, Sept. 23, 1902;

No. 814,592, H. B. Duane, Mar. 6, 1906;

No. 823,008, I. H. Vendig, June 12, 1906;

No. 1,004,055, Martin, *et al.*, Sept. 26, 1911;

British patent No. 14,388, of 1892.

IX.

This defendant further answering avers that said re-issue letters patent are invalid as proper reissue letters patent by reason of the claims thereof having been broadened.

X.

This defendant further answering says that the said original letters patent No. 1,054,826, and the reissue thereof No. 14,000, are each null and void because said Louis M. Cole was not the first and original inventor thereof, but that prior to his alleged invention thereof or more than two years prior to the date of his original application therefor, the same, or substantially the material parts thereof, had been made or invented and were known to and publicly used by the following named parties at the following named places, to-wit:

Wm. Wrigley, Jr., Chicago, Illinois;

Nelson J. Buck, Chicago, Illinois;

James C. Cox, Chicago, Illinois;

Wm. Wrigley, Jr., Company, Chicago, Illinois;

Zeno Manufacturing Co., Chicago, Illinois;

Kirkman & Son, Brooklyn, New York;

B. T. Babbitt, New York City, N. Y.;

Standard Milk Premium Stores, Boston, Mass.;

Swift & Co., Chicago, Ill.;

Colgate & Co., New York City, N. Y.;

The Globe Soap Co., Cincinnati, O.;

The Lekko Soap Co., Chicago, Ill.;

N. K. Fairbank Co., Chicago, Ill.;

Proctor & Gamble Co., Cincinnati, O.;

Wilson Distilling Co., Baltimore, Md.;

Lantry Bros. & Co., Buffalo, N. Y.;

James S. Kirk & Co., Chicago, Ill.

The prior use by all the above named parties having taken place in the city set opposite each name; and to others at present unknown to this defendant, but whose names and addresses, when discovered, it prays leave to insert by amendment.

XI.

This defendant denies that the pretended invention and improvements as described and claimed in said letters patent reissue No. 14,000, and particularly claims 2 and 3 thereof, exhibit any patentable subject-matter in view of the state of the art as the same existed at the date of said pretended invention, but, on the contrary, it avers that said pretended invention or improvements, is and are deficient in patentable quality and exhibit that which is the result of mere selection or mechanical skill as distinguished from the exercise of the inventive faculty.

XII.

This defendant avers that the said pretended invention or improvements described and claimed in said reissue letters patent No. 14,000, and particularly claims 2 and 3 thereof, are not in fact mechanical combinations within the meaning of the patent law, but are mere aggregations of devices old in the art, each of which continues to perform its appropriate functions without modification from its association with other elements pretended to be combined with it.

XIII.

This defendant further avers that prior to the grant-

ing of reissue letters patent No. 14,000 it was selling and offering for sale the precise form of label which it is now selling and offering for sale.

XIV.

This defendant further answering denies that the complainant is entitled to any accounting whatsoever for damages or profits and prays the same advantage of the foregoing answer as if it had pleaded the several matters and things aforesaid to the bill of complaint material or necessary to make answer unto, and if there is any other matter, cause or thing in said bill of complaint necessary for said defendant to make answer unto, and not herein well and sufficiently answered, confessed, traversed, avoided or denied, says the same is not true, to the knowledge and belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct; and the defendant prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

ED. G. HOOKSTRATTEN CIGAR CO.,

(Seal)

By W. A. Pickarts, Secretary.

C. HUGHES JORDAN,

JAMES R. OFFIELD,

Solicitors for Defendant.

JAMES R. OFFIELD,

Of Counsel for Defendant.

[Endorsed]: Equity C 3. U. S. District Court, Southern Dist. of California, Southern Division. Louis M. Cole vs. Ed. G. Hookstratten Cigar Co. Answer of defendant. Received a copy of the within answer this 3rd day of January, 1916. Joseph F. Westall,

solr. & of counsel for complt. Filed Jan. 3, 1916. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. C. Hughes Jordan, Suite 821 Herman W. Hellman Bldg., Los Angeles, Cal. James R. Offield, patents, trade marks, copyrights, Monadnock Block, Chicago.

*In the District Court of the United States, Southern
District of California, Southern Division.*

LOUIS M. COLE,

Plaintiff,

vs.

ED. G. HOOKSTRATTEN CIGAR CO.,

Defendant.

In Equity C-3.

Final Decree.

This cause came on to be heard at the July term of the said court in the year 1916, and was argued by Joseph F. Westall, counsel for complainant, and James R. Offield, counsel for the defendant; thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

That reissue letters patent No. 14,000, dated October 26th, 1915, to Louis M. Cole, being the letters patent referred to in the bill of complaint herein, are good and valid as respects the second and third claims thereof;

That the said Louis M. Cole was the first and original inventor and discoverer of the improvements in labels described and claimed in claims 2 and 3 of said letters patent and the specifications annexed thereto

and that the said Louis M. Cole is the sole owner of said patent;

That the said Ed. G. Hookstratten Cigar Co., the defendant herein, does not infringe either of said claims 2 and 3 of said letters patent, or the exclusive rights of the complainant under the same; that is to say, selling and using labels alleged to embody the said invention and improvement, patented as aforesaid, as charged in the bill of complaint.

And it is further ordered, adjudged and decreed that the defendant do recover of the complainant its costs, charges and disbursements in this suit to be taxed.

BENJAMIN F. BLEDSOE,

District Judge.

Los Angeles, California, December 4, 1916.

O. K. as to form.

JOSEPH F. WESTALL,

Solr. and of Counsel for Pltff.

Decree entered and recorded December 4, 1916. Wm. M. Van Dyke, clerk; by T. F. Green, deputy.

[Endorsed]: In Equity C-3. In the District Court of the United States, Southern District of California, Southern Division. Louis M. Cole, plaintiff, vs. Ed. G. Hookstratten Cigar Co., defendant. Final decree. Filed Dec. 4, 1916. Wm. M. Van Dyke, clerk; by T. F. Green, deputy. James R. Offield, C. Hughes Jordan, 718 Investment Building, Los Angeles, Calif., attorneys for defendant. Ent. Eq. Jl. 4 P. 128.

*In the United States District Court, Southern District
of California, Southern Division.*

LOUIS M. COLE,

Plaintiff,

vs.

ED. G. HOOKSTRATTEN CIGAR COMPANY,
a Corporation,

Defendant.

In Equity No. C-3.

Opinion of the Court.

Bledsoe, J. (Orally.)

"Well, there is not very much room for dispensing what might be termed real justice between parties in patent proceedings. The question is: What has the government given the patentee a right to, or monopoly of, and whether or not anyone who has manufactured something in the similitude of that device, or object, or instrumentality has infringed.

Now, as I read this patent and construe it, together with all of the facts and circumstances that seem to be involved, which I think the court is called upon to consider in construing what the patent office comprehended Mr. Cole should be granted a monopoly of, I can't relieve my mind from the feeling that it was intended that he should be granted a patent and granted a monopoly with respect to a label upon a package or container which had placed upon it in some way on the outside, so it could easily be seen, a line which would indicate where the label might be severed so as to retain in its entirety and in its integrity the printed matter on the inside of the label. The object was to preserve that from the knife for whatever purpose it

might be required, either because it was to provide a purchaser some kind of a premium, or give him some information, and I think without question that it hinges around the use of the word "sever" on the label.

The Star Milk label is very similar to the label of the plaintiff, except that there is no indication on the outside where you should sever the paper, no precise indication, and thereby protect the matter on the inside. What information is given is with respect to where you should sever it so as not to affect or interfere with the rights to be obtained by reason of the premium which was to be secured from the printing on the outside of the label. In other words, the writing on the inside did not have anything to do with the information to be acquired by him who would profit thereby. That differentiates it from the label of Mr. Cole, because in his case the useful information, what the person who would sever the label was going to inquire about, was hidden, contained on the inside of the label. Therefore, he wanted to know with some certainty or definiteness as to where he might cut the label, sever it, so that he would not impair, or lessen, or minimize the valuable information contained on the inside of the label.

Now, that seems to be the reason for the granting of the patent in that particular behalf. The prior art then would seem to have been the situation where the improvement made was provided with a line along which the label could be cut in order that the hidden information might be secured in its entirety. That seems to be the situation. Now, this Wrigley's Spearmint Gum label, really in its substantial aspects is not

very much different from the old fashioned soap label with which we have been confronted for years gone by. It is impossible to state whether these soap labels were placed around the soap, whether it is one bar of soap, or five pieces of chewing gum, I do not suppose would make any difference. There is nothing in that that would be a matter of any consequence, whether it was placed around there and folded. The Wrigley container is not folded, except as it is folded around the article, obviously secured by mucilage; nothing to show whether the soap wrapper may have had mucilage on it or not. It is impossible to determine; I do not suppose that would be a feature of any moment. The principal fact is that it should be indicated, that it should be removed without harming the thing of value that might have been on the inside and in all substantial aspects, that is accomplished by the Derby Soap wrapper, at least, which merely indicates on the exterior surface that you are to save this wrapper. Now, the Wrigley wrapper says "This wrapper is a United Profit-Sharing Coupon, as stated on the back. Save this complete wrapper. Remove carefully. Pull back here." Now, the "remove carefully," is, of course, an admonition that is not patentable, probably, and is a useless admonition. The only possible invasion of the patented rights would be in the use of the phrase "Pull back here," and in my judgment there is nothing that has been accomplished by the plaintiff with respect to his wrapper that makes this Wrigley wrapper an infringement of his invention and improvement, because I think in its essential aspects the Wrigley wrapper is similar to the soap wrappers. They are to be

pulled back, might be broken, probably would be broken if they did not have the "Remove carefully" on there. But even in the face and presence of that, they might be broken and the interior surface disfigured and rendered useless more or less, but the distinct difference, in so far as there may be a distinct difference,—it is a small matter, but then these are all small matters, the distinct difference is that Mr. Cole's patent provides a label which should be cut along a line in order to preserve the integrity of the concealed matter beneath, and I am of the belief under the evidence that this is not an infringement, and it will be so adjudged.

[Endorsed]: Original. No. C-3 in Equity. In the District Court of the United States, in and for the Southern District of California, Southern Division. Louis M. Cole, complainant, vs. Ed. G. Hookstratten Cigar Company, a corporation, defendant. Opinion of the court. Filed May 11, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Westall and Wallace, attorneys at law, Suite 516 Trust & Savings Bldg., Los Angeles, F 5683, Main 8508, attorneys for plaintiff.

*In the District Court of the United States, Southern
District of California, Southern Division.*
LOUIS M. COLE,

Plaintiff,

vs.

ED. G. HOOKSTRATTEN CIGAR COMPANY,
Defendant.

No. Equity C-3.

Stipulation.

It appearing that the defendant in paragraph X of its answer has set up the names of certain corporations

and individuals alleged to have publicly used certain forms of labels prior to the filing date of original letters patent No. 1,054,826 filed August 8, 1911, said original letters patent being reissued October 26, 1915, No. 14,000; and,

It further appearing that the defendant has served notice and procured an order of court for the taking of testimony to prove the use of labels by the corporations and individuals whose names are set forth in paragraph X of its answer, and it further appearing that much time and money can be saved the respective litigants by entering into a stipulation whereby complainant admits certain facts which the defendant believes can be unquestionably proven,

It is, therefore, stipulated and agreed between counsel for the respective parties that the following described labels were in universal public use throughout the United States, or large areas thereof, by the respective manufacturers whose names appear upon the various labels, prior to January 1st, 1908, and that this stipulation shall have the same force and effect as evidence as if each one of the specific labels herein identified and referred to had been completely proven by full proof to have been in public use prior to January 1st, 1908. The labels stipulated are as follows:

“Star Brand” condensed milk label publicly used by Borden’s Condensed Milk Company and Borden’s Premium Co., Incorporated, of the city of New York, in the state of New York, and elsewhere in the United States prior to January 1, 1908;

Kirkman’s “Borax Soap” label publicly used by Kirk-

man & Son of Brooklyn, N. Y., used in the state of New York and elsewhere *through the* United States prior to January 1, 1908;

Colgate & Co.'s "Octagon" soap label publicly used by Colgate & Co., of New York City, used in the state of New York and elsewhere throughout the United States prior to January 1, 1908;

B. T. Babbitt's "Best" soap label publicly used by B. T. Babbitt of New York City and used extensively throughout the United States prior to January 1st, 1908;

Proctor & Gamble's "Star" soap label publicly used by Proctor & Gamble Company of Cincinnati, O., *through the* state of Ohio and generally throughout the United States prior to January 1, 1908;

Proctor & Gamble's "Derby" soap label publicly used by Proctor & Gamble Company of Cincinnati, O., throughout the state of Ohio and generally throughout the United States prior to January 1, 1908;

Proctor & Gamble's "Gold" soap label publicly used by Proctor & Gamble Company of Cincinnati, O., throughout the state of Ohio and generally throughout the United States prior to January 1, 1908;

Proctor & Gamble's "Satin Gloss" soap label publicly used by Proctor & Gamble Company of Cincinnati, O., throughout the state of Ohio and generally throughout the United States prior to January 1, 1908;

Swift & Co.'s "Classic" soap label publicly used by Swift & Co., of Chicago, Illinois, throughout the state of Illinois and generally throughout the United States prior to January 1, 1908;

It is further stipulated that the "Star" brand con-

densed milk label was publicly used upon the common form of condensed milk tin or container, the same encircling the container and glued at the meeting ends.

It is further stipulated that the Zeno Manufacturing Company of Chicago, Illinois, publicly used, prior to January 1, 1908, labels such as hereto attached to this stipulation wherein an adhesive was so applied near the meeting ends of the labels as to leave one edge free whereby the label might be readily removed by pulling back the free edge.

It is further stipulated and agreed that Wm. Wrigley, Jr., Company of Chicago, Illinois, publicly used prior to January 1, 1908, labels adapted to be wrapped around five sticks of chewing-gum and having their meeting edges secured together by means of an adhesive which was applied behind one of the edges so as to leave a free edge whereby the label might be readily removed from the package. It is further stipulated, however, that in so far as the Wrigley label is concerned, this company did not, prior to January 1, 1908, employ a label with a coupon or profit-sharing certificate printed upon the inside thereof, nor did it print a label with the words "Remove carefully. Pull back here" printed thereon. A package of chewing-gum containing a label as used by Wm. Wrigley, Jr., Company prior to January 1, 1908, is hereto attached to this stipulation, it being admitted, however, by the defendant that such prior label was not in coupon form as above noted.

It is further stipulated that the photo copies of the labels above referred to used by the various soap manufacturers and Borden's Condensed Milk Company, are

true copies of the original labels which will be produced at the hearing of said cause by defendant's counsel.

JOSEPH F. WESTALL,

Counsel for Complainant.

JAMES R. OFFIELD,

Counsel for Defendant.

Chicago, Ill., June 19, 1916.

Approved. BLEDSOE, J.

[Endorsed]: In the District Court of the United States, Southern District of California, Southern Division. No. Equity C-3. Louis M. Cole, plaintiff, vs. Ed. G. Hookstratten Cigar Company, defendant. Stipulation (as to evidence). Filed Jun. 30, 1916. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. James R. Offield, patents, trade marks, copy-rights, Monadnock Block, Chicago.

*In the United States District Court, Southern District
of California, Southern Division.*

LOUIS M. COLE,

Plaintiff,

vs.

ED. G. HOOKSTRATTEN CIGAR COMPANY,
a Corporation,

Defendant.

In Equity No. C-3.

**Statement of Proceedings and Evidence on Appeal
Under Equity Rule 75.**

Los Angeles, California, Friday, November 17, 1916;
2:50 p. m.

Appearances:

For plaintiff: Joseph F. Westall, Esq.

For defendant: James R. Offield, Esq., C. Hughes Jordan, Esq.

Mr. Westall (after opening statement): "We offer in evidence a copy of the Cole reissue patent No. 14,000, dated October 26, 1915. I understand that counsel will stipulate that uncertified copies of patents may be introduced in evidence with the same force and effect as the originals, or duly certified copies.

Mr. Offield: By both parties.

Mr. Westall: Yes, by both parties.

Mr. Offield: Surely.

Mr. Westall: We introduce this in evidence as Plaintiff's Exhibit 1.

The Court: Is that your reissue?

Mr. Westall: That is the reissue patent.

The Court: Claim 3 under the reissue patent seems to be precisely as it is on your original patent.

Mr. Westall: No, Your Honor. I think you have the reissue. Claim 3 is a new claim. The original patent has not been offered in evidence and will not be because we are not suing on the original patent.

The Court: I thought this offered in evidence was the original, but this is the reissue?

Mr. Westall: This is the reissue.

The Court: Oh, I see.

Mr. Westall: We offer in evidence a package marked "Wrigley's Spearmint Chewing Gum,"—

The Court: That reissue of patent, I suppose, is Plaintiff's Exhibit 1.

Mr. Westall (indicating assent and continuing)—

which we understand counsel stipulates, is one of the defendant's packages made, used and sold, containing the label described in the complaint, used and sold prior to the institution of this suit; is that correct?

Mr. Offield: That is correct, yes.

The Court: It will be Plaintiff's Exhibit 2.

Mr. Westall: I believe that is our case.

Mr. Offield: I should like to offer in evidence in behalf of the defendant the file history of the original patent, patent No. 1,054,826, to Louis M. Cole, dated March 4, 1913, this file history, together with the file history of the reissue patent No. 14,000, to Louis M. Cole, reissued October the 26th, 1915, are both uncertified copies of the file histories of these two patents, and they are offered subject to correction by the filing of certified copies, if any correction is necessary. I ask that the file history of the original patent be marked Defendant's Exhibit No. 1 and that the file history of the reissue patent be marked Defendant's Exhibit No. 2.

Mr. Westall: They may be admitted.

The Court: Or A and B?

Mr. Offield: A and B.

Mr. Westall: Plaintiff stipulates that the documents referred may be admitted, with the privilege of being corrected, if they are found inaccurate. We haven't had an opportunity to examine them and they are uncertified.

The Court: That is perfectly agreeable?

Mr. Offield: That is perfectly agreeable, Your Honor. Also copy of letters patent 371,144 of October

4, 1887, as Defendant's Exhibit C. Copy of patent No. 7094—

The Court: What number was that last one?

Mr. Westall: C.

The Court: The number of the patent.

Mr. Offield: 371,444 of October 4, 1887. Patent No. 709,464 of September 23, 1902, offered as Defendant's Exhibit D; patent No. 643,772 of February 2, 1900, Defendant's Exhibit E. Patent No. 418,122 of December 24, 1889. Defendant's Exhibit F; patent No. 1,004,055 of September 26, 1911, Defendant's Exhibit G; No. 814,592 of March 6, 1906, Defendant's Exhibit H; No. 566,761 of September 1, 1896, Defendant's Exhibit I; No. 589,406 of September 7, 1897, Defendant's Exhibit J. In addition to these patents, Your Honor, and stipulation—first, an order of court was obtained to take the testimony of quite a large number of witnesses—prior use witnesses, and that order of court was granted and notice thereupon served upon complainant's counsel for the taking of this testimony at several places in the east. A short time before the taking of that testimony complainant's counsel offered to stipulate this evidence. I prepared a stipulation setting forth what the evidence was in these various prior use instances, and I furnished complainant's counsel with photographic copies of each original label which I had in my possession, photographic copies being filed with the stipulation at the time. The stipulation provided that—"Stipulated that the photo copies of the labels above referred to, used by the various soap manufacturers and Borden's Condensed Milk Company are true copies of the labels which will be

produced at the hearing of said cause by defendant's counsel," and I wish to offer in evidence to complete that stipulation the following original labels:

Borden's Condensed Milk Company label, as Defendant's Exhibit K.

Colgate & Company, octagon label, as Defendant's Exhibit L.

Kirkman's Borax Soap label, as Defendant's Exhibit M.

Babbit Soap label, as Defendant's Exhibit N.

Proctor & Gamble Star Soap label, Defendant's Exhibit O.

Proctor & Gamble Derby Soap label, Defendant's Exhibit P.

Proctor & Gamble Gold Soap label, Defendant's Exhibit Q.

Proctor & Gamble Satin Gloss Soap label, Defendant's Exhibit R.

Swift & Company Classic Soap label, Defendant's Exhibit S.

In addition to this evidence, the stipulation provides that the Zeno Manufacturing Company of Chicago, Illinois, publicly used prior to January 1, 1908, labels such as hereto attached to this stipulation, where an adhesive was so applied to the wrapper whereby the label might be readily removed by pulling back the free edge. I have with me the witness who was an officer of the Zeno Manufacturing Company for a large number of years, and I wanted to place this one witness on the stand to prove, first, that the Zeno Manufacturing Company for more than fifteen years have used the label as applied in this package. That

is, with the end of the label extending beyond the edge of the package so as to facilitate the removal of the label; second, to prove that the label used by the Zeno Manufacturing Company, while it did not have any printed matter, whatsoever, on the inside of the label, that the label itself, however, was used as a coupon and redeemable as such. I have in support of that an advertising circular taken from an old book that I wanted to prove up by this witness, showing Zeno Chewing Gum penny wrappers of 1906, showing they are redeemable. Further, I wanted to prove by this witness that the Zeno Manufacturing Company's entire assets were purchased by William Wrigley, Jr., Company, by whom the witness is now employed,—in 1906, I believe, it was. I may say that the William Wrigley, Jr., Company is the manufacturer of this chewing gum product which is sold by the Hookstratten Cigar Company here, who are made the defendants in this case; therefore, the Hookstratten Company has been sued for the selling of a product made by the William Wrigley, Jr., Company, Chicago.

Now, if complainant's counsel wishes to stipulate briefly the evidence, as outlined here, I shall be very glad to stipulate to save time, or I will be glad to put Mr. Cox on the stand, who will testify to that effect.

Mr. Westall: Plaintiff will stipulate to the facts stated by counsel.

Mr. Offield: Then I should like to offer in evidence, as Defendant's Exhibit T, the chewing gum circular published by the Zeno Manufacturing Company, which bears the year 1906 upon its face, and which identifies these wrappers used upon Zeno Chewing

Gum as being premium or coupon wrappers. I believe you have seen that, Mr. Westall. I have not a copy of that; that is the only one I have; it is taken from an old book. (Handing paper to Mr. Westall.)

Mr. Westall: We will stipulate that may go in, but subject to the objection that it is incompetent, irrelevant and immaterial.

Mr. Offield: With the introduction of that and these three packages of Zeno Chewing Gum, with the labels as represented, according to the stipulation that has been entered into, the four packages of gum as Defendant's Exhibit U, I will rest the defendant's case.

Approved. BLEDSOE, Judge.

Approved. J. R. OFFIELD.

[Endorsed]: Original. No. C-3. In Equity. In the District Court of the United States, in and for the Southern District of California, Southern Division. Louis M. Cole, complainant, vs. Ed. G. Hookstratten Cigar Company, a corporation, defendant. Statement of proceedings and evidence of appeal under equity rule 75. Lodged May 11, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Filed June 8-1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy. Westall and Wallace, attorneys at law, Suite 516 Trust & Savings Bldg., Los Angeles, F 5683, Main 8508, attorneys for plaintiff.

Cole ...
Hochschalten
Pf ...
... 18 ...

GEO. W. FENIMORE

L. M. COLE.

LABEL.

APPLICATION FILED DEC. 26, 1914.

Reissued Oct. 26, 1915.

14,000.

Fig. 1.

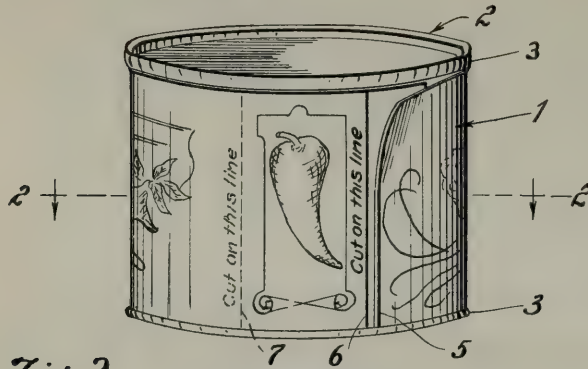


Fig. 2.

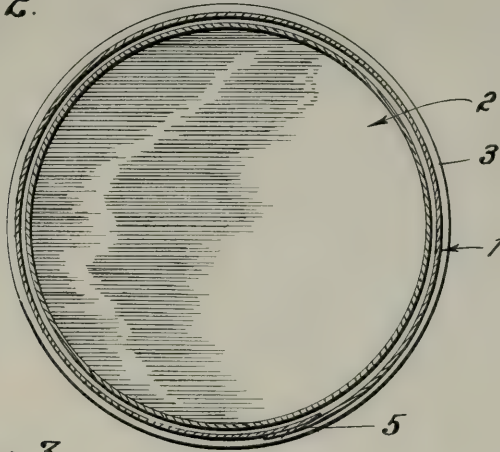
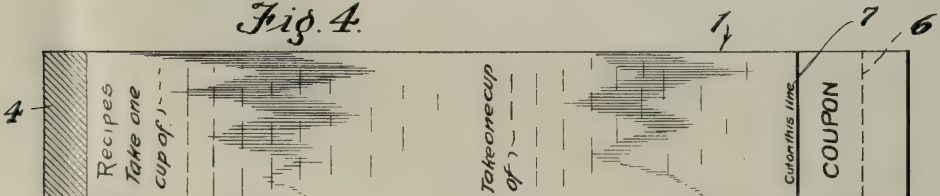


Fig. 3.



Fig. 4.



Witnesses

B. A. Piel

Marguerite Bates.

Inventor

Louis M. Cole

By *Hazard Mause*
Att'ys

UNITED STATES PATENT OFFICE.

LOUIS M. COLE, OF LOS ANGELES, CALIFORNIA.

LABEL.

14,000.

Specification of Reissued Letters Patent. Reissued Oct. 26, 1915.

Original No. 1,054,826, dated March 4, 1913, Serial No. 843,055. Application for reissue filed December 26, 1914. Serial No. 879,221.

To all whom it may concern:

Be it known that I, LOUIS M. COLE, a citizen of the United States, residing at Los Angeles, in the county of Los Angeles and State of California, have invented new and useful Improvements in Labels, of which the following is a specification.

This invention relates to improvements in labeling means for receptacles, cans or the like.

It is an object of the invention to provide a label upon a goods inclosing receptacle which is adapted to contain advertising matter properly exposed to view and which is also adapted to have placed thereon information, recipes or other data, which may be exposed to view when desired for use.

It is an object of the invention to provide a receptacle with a movably mounted label having impressions upon both sides thereof for indicating certain data.

In the accompanying drawing forming a part of this specification, Figure 1 is a perspective view of a can suitable for containing any line of goods, the said can having the improved movable label mounted thereon. Fig. 2 is a transverse sectional view through the can taken upon the line 2-2 of Fig. 1 but showing the can upon an enlarged scale. Fig. 3 is a plan view of the label employed, the same being flattened out as before applying to the can, the outside of the label being shown. Fig. 4 is a similar plan view showing the inside of the label.

The details of the invention will now be more particularly described, reference being had to the drawing in which 1 indicates a label which is usually made of paper and is provided on the outside with any desired configurations, artistic designs or wording to represent the goods which is to be inclosed in the can or receptacle to which the label is applied.

2 indicates a can of ordinary construction having projecting edge flanges 3 at its upper and lower ends for limiting the movement of the label thereon and preventing it from slipping from place. The label is provided with a gummed portion on the inner surface of one end thereof as at 4 which is adapted to lap over the other end thereof when the label is applied to the can so as to be made to adhere thereto for fastening

the end of the label together, as indicated at 5 in Fig. 2.

The gummed portion of the label is preferably so arranged that when the ends are fastened together the label will not adhere to the can or receptacle at any point but will be loosely mounted thereon as shown in Fig. 2. The said label is also provided with a line or indicating mark 6 upon its outer surface showing where the label is to be cut for removing it and the words "Cut on this line" may be arranged adjacent thereto. The line for cutting the label is preferably located to one side of the lapped ends so that the cut need only be made through a single thickness of the paper or other material of which the label is composed.

The inner surface of the label is provided with various data and printed matter, which it is desired to convey to the purchaser of the goods, for instance a portion of said label on its inner surface is provided with printed matter indicating that it is a coupon, one or more of which if saved and presented to the company selling the goods will command some kind of a premium. The inner surface of the said label is provided with a line 7 indicating where the same should be cut to sever the coupon therefrom. The remaining portion of the label upon its surface is preferably provided with desirable data such for instance as recipes for preparing the material contained in the can if it be food or for cooking generally or for setting forth any other desirable or useful information.

The label thus forms a desirable addition to the receptacle not only because of its advertising qualities in setting forth the properties of the goods for the merchant or distributor, but also because of the information, coupons or the like which is obtained by removing and preserving the said label.

It will be understood that a label of this character may be applied to various kinds of receptacles, cans or the like in which goods are packed so that said label placed thereon is capable of being removed for the purposes above set forth.

What I claim is:

1. As a new article of manufacture, a label adapted to be detachably fastened around a can, provided on its upper and lower edges with retaining flanges by fas-

tening the ends of the label together, said label having printed display matter on the outer surfaces and a printed coupon and other useful printed matter on the inner surface thereof, said label also being provided with a transversely disposed cutting line thereon out of registry with said printed coupon and other printed matter, whereby when the label is cut on said line it can be removed from the can so that the printed matter can be read on the concealed side of the label and the coupon detached therefrom in an unmutilated condition.

2. As a new article of manufacture, a label adapted to be detachably secured around a container, said label for said container having display matter relating to the contents of the container on its outer face, the inner face of said label bearing useful printed matter, said label being provided on its outer face with a line disposed transversely thereto and out of registry with said useful printed matter indicating where said label

should be severed to remove the entire label from the container without mutilating the matter on its inner side.

3. As a new article of manufacture, a label adapted to be detachably secured around a package, said label having display matter relating to the contents of the package on its outer face, the inner face of said label bearing useful printed matter, said label being provided on the outer face thereof with a line out of registry with said useful printed matter indicating where the label may be severed to remove the entire label without mutilating the printed matter on its inner face.

In witness that I claim the foregoing, I have hereunto subscribed my name this 19th day of December, 1914.

LOUIS M. COLE.

Witnesses:

R. S. BERRY,
MARGUERITE BATES.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

PATENT NO. 1,054,826 TO LOUIS M. COLE.

Labels. Application executed Aug. 2, 1911. Filed complete Aug. 8, 1911. Serial No. 643,055. Examined, A. D. Merritt, Exr. Div. 35, Jan. 11, 1913. Notice of allowance Jan. 16, 1913. Final fee cert. dated Jan. 28, 1913. Final fee cert. \$20, Feb. 3, 1913. Patented Mar. 4, 1913. Attorneys: Hazard & Strause, Los Angeles, Cal.

CONTENTS.

1. Application.
2. Rejection, Sept. 9, 1911.
3. Amendment "A," Oct. 30, 1911.
4. Rejection, Nov. 25, 1911.
5. Amendment "B," Jan. 2, 1912.
6. Rejection, Feb. 5, 1912.
7. Amendment "C," Mar. 4, 1912.
8. Letter to office, Mar. 13, 1912.
9. Rejection, Apr. 12, 1912.
10. Amendment "D," May 21, 1912.
11. Rejection, June 13, 1912.
12. Amendment "E," June 25, 1912.
13. Rejection, July 24, 1912.
14. Letter to office, Nov. 23, 1912.

(Cl. 40-2.)

(In the petition, applicant's P. O. address is given as 235 S. Central Ave., Los Angeles, Cal.)

SPECIFICATION:

(The specification is the specification of the patent without change.)

CLAIMS:

1. As a new article of manufacture, a removable label having desirable information or data applied upon the inner face thereof and adapted to be movably held in position upon a can or receptacle.

2. A label for cans, comprising a strip of material having adhesive material applied to the ends thereof whereby the ends may be lapped for loosely securing the label upon the receptacle, the said label having advertising matter and artistic configurations representing the goods upon the outer face thereof and having upon its inner face important information, recipes, coupons or like data.

3. A label for cans, receptacles or the like, comprising a strip of paper or like material adapted to be loosely applied about a can and having its ends secured to hold it in position, the said label having a line of demarkation upon it which may be cut for removing it, the said label having upon its inner surface printed matter indicating coupons of value and other information and having a line of demarkation upon which the coupon may be cut or severed from the label.

4. In combination with a can or receptacle having label retaining projections thereon, of a removable label loosely mounted between said projections and having printed data upon the outer and inner surface thereof, the said label being adapted to be severed at a given point for reaching the data upon the inner surface of said label.

Application executed in Los Angeles Co., Cal., Aug. 2, 1911.

No foreign patents or applications cited in oath.

(Paper No. 2, Rejection, Sept. 9, 1911.)

Case has been examined.

Claim 4, line 4, cancel "i" after "and."

Claims 1, 2 and 4 are rejected on Hosmer, 566,761, Sep. 1, 1896, 40-4 especially in view of Duane 814,592, Mar. 6, 1906, 40-2 which latter patent has instructions for the use of the contents.

No invention would be involved in placing the information on the inside of the tag.

Claim 3 is rejected on the above cited references further in view of the removable coupon shown in

Vendig, 823,008, June 12, 1906, 40-4.

Attention is called to O'Meara, 580,707, Apr. 13, 1897, 40-131.

G. P. TUCKER, Exr.

(Paper No. 3, Amendment "A," Oct. 30, 1911.)

In response to examiner's letter of Sept. 9, 1911:

Cancel claims and insert:

1. As a new article of manufacture, a removable label for receptacles adapted to have advertising matter upon the exterior surface and desired date upon the inner surface thereof, whereby the label must be broken to reach the said inner date, the said label being loosely held in position and having indications marked thereon showing where the label should be broken for removal without injuring the date upon the inner side thereof.

2. A label for cans, comprising a strip of paper loosely mounted upon the cans and having its end pieces secured together, said paper having advertising material upon the exterior and a premium coupon upon

A its inner surface, whereby the label must be cut and removed from the can to obtain said coupon, the said label also having a line of damarkation upon it showing where the label should be cut not to destroy the said coupon.

REMARKS.

The claims in this application have been modified in view of the references cited, and are presented in specific form to bring out the novelty of applicant's device. It will be seen that applicant is the first to loosely mount a paper label upon the outer surface of a can or like receptacle, merely securing the paper at its ends by paste to hold it upon the can, the label thus being properly made to receive information, the premium coupons, receipts or other data upon its inner surface.

Cooperating with this structure is the information and marking upon the exterior of the label, showing where it is best to cut the label in removing it in order to not destroy the data or coupon on the inner surface.

The Hosmer device, relied upon, is for an entirely different type of label and shows outside removable holding means for clamping a label to a bottle. This device is intended to form a mechanism for permitting of the changing of labels, whereas applicant's device does not contemplate the use of a label over again, or the placing of a new one in position. His label is to be cut and turned over for further use, but not to be again applied to the can or receptacle.

In the Duane patent, the label is evidently not loosely secured to the can, if it were the piece placed behind it would shift from position, except when it is pasted in

position as indicated in the specification is the case in some instances. In this form of label also there is no idea of placing important data or information or premiums upon the inside of the label. In fact applicant appears to be the first one to suggest such an idea.

The Vendig device is for an entirely different type of label and is not sufficiently in point. The O'Meara device contemplates the use of an advertising strip which must be transparent and capable of properly showing an advertisement when light is passed through the cable. This is different from applicant's idea for if data were placed on both sides of a strip such as is shown in the O'Meara mechanism, there would be a confusion of markings, and applicant's label could not be used on the O'Meara device. In fact the O'Meara device could not have information upon the inside of the strip without destroying its usefulness.

In view of these considerations and the specific presenting of the claims, it is believed that applicant's case should now receive favorable action.

(Paper No. 4, Rejection, Nov. 25, 1911.)

In response to the amendment filed Oct. 30, 1911:

The claims are both rejected on Duane, of record, or on

Martin, 1,004,055, Sept. 26, 1911, (40-2), especially in view of

Braly, 589,406, Sept. 7, 1897, (40-4).

The placing of matter on the inside of the tag instead of on the outside would involve no invention, and is furthermore suggested in Braly.

G. P. TUCKER, Exr.

(Paper No. 5, Amendment "B," Jan. 2, 1912.)

In response to examiner's letter of Nov. 25, 1911:

Cancel all the claims and insert:

1. A label for cans comprising a band adapted to be applied around the can and have its ends secured together for holding it upon the can without the adhering of the label to the surface of the can whereby the interior surface of the label is free to receive data and coupons of value.

2. As a new article of manufacture, a strip of paper having printed matter upon both surfaces, the said strip being adapted to be secured between retaining projections upon a can, whereby the inner surface of the label is free of paste and does not adhere to the can so that the label may be removed and the data upon the inner surface thereof rendered useful.

REMARKS.

The claims in this application have been redrawn to more closely distinguish from the references cited. Applicant appears to be the first one to place loosely upon a can between retaining flanges a label free from paste upon its inner surface and not adhering to the can so that data, coupons or the like placed upon the inner surface of the label may be made available and useful by the removal of the label.

(Paper No. 6, Rejection, Feb. 5, 1912.)

In response to the amendment filed Jan. 2, 1912:

Claim 1 is rejected on Hosmer, of record.

Claim 2 is rejected on Hosmer, especially in view of Braly of record.

G. P. TUCKER, Exr.

(Paper No. 7, Amendment "C," Mar. 4, 1912.)

In response to examiner's letter of Feb. 5, 1912:

Cancel the claims and insert:

1. A label for cans, comprising a loose can encircling band adapted to be arranged about the can and have its ends secured together for holding it in position thereon without adhering to the surface of the can, whereby the carrying of data or coupons upon the inner surface of the label may be facilitated.

2 As a new article of manufacture, a strip of paper having the printed matter of a label on the outer surface thereof and other printed matter upon the inner surface, the said strip of paper being adapted to be loosely secured between retaining flanges upon a can so that the inner surface of the label is free of paste and does not adhere to the can whereby upon cutting the label the material upon the inner face thereof can be rendered useful.

REMARKS.

The claims in this application have been rewritten, particularly as the device in its specific form as set forth does not appear in any of the references cited.

The Hosmer patent cited is most decidedly for a different structure from that asked for by applicant, for it will be noted at once that any advertising or printed matter contemplated in the Hosmer invention is not disposed upon the outer surface of a can or bottle, but is fitted beneath glass covering pieces which are sealed at their edges so that the label or printed material is entirely encased between the walls of the bottle and the walls of the outer glass piece. Cer-

tainly such a label cannot be available for ready removal by the customer to obtain coupons or receipts placed upon the inner surface of the ordinary paper label.

The Brawley patent also fails in showing the ordinary bottle or can enclosing paper label loosely mounted upon the outer surface of the receptacle so that it may be cut for removing since it is not pasted to the surface of the can or bottle.

Applicant seems to be the first one to use the ordinary paper label loosely upon a can and print coupons, receipts or other matters which people desire and which do not pertain to the advertising of the goods itself upon its inner surface, the loose condition of the label permitting of its being cut so as to render the coupons or other material upon the inner surface of the label easily accessible and that in good condition. If the label were pasted in place such material would be useless when placed upon the inner surface thereof. It is believed that applicant clearly has patentable subject matter over the references cited and that the claims should receive favorable action, and such action is now expected.

(Paper No. 8, Letter to Office, Mar. 13, 1912.)

In connection with the last amendment made in this application dated Feb. 27, 1912, we desire also to call the examiner's attention to the labels contemplated in this case and enclose herewith samples thereof for the perusal of the examiner. The examiner will note the manner of placing the premium coupon and the receipts on the back of the label and he will also note

upon the front of the label the red line indicating where the label is to be cut. The label is not pasted to the cans but merely pasted together at its end to form a loose ring about the cans.

(Paper No. 9, Rejection, Apr. 12, 1912.)

In response to the amendment filed Mar. 4th and the letter filed Mar. 13th, 1912:

Claim 1 is rejected on Hosmer, of record.

Claim 2 is rejected on Hosmer in view of Braly, of record, for the reasons of record.

G. P. TUCKER, Exr.

(Paper No. 10, Amendment "D," May 21, 1912.)

Responsive to examiner's letter of Apr. 12, 1912:

Cancel the claims and insert:

Claim of patent with changes shown.

REMARKS.

The applicant has restricted his invention to a single claim and it is believed that this claim clearly differentiates from the references cited. The patent to Hosmer illustrates a milk bottle which is provided with an annular recess for the placement of a label which can be removed before inserting new labels containing other advertising matter, that is it may be changed from time to time.

The purpose of applicant's device as clearly set forth in the specification is to utilize not only the front for advertising but the rear of the label which is concealed for printed recipes, coupons, etc. so that it may be readily and easily removed therefrom to read the matter on the concealed portion.

As the claim is limited to the precise construction and as a new article of manufacture, it is thought the examiner should pass the case to issue and such action is now expected.

(Paper No. 11, Rejection, June 13, 1912.)

In response to the amendment filed May 21, 1912:

The claim is rejected on Hosmer especially in view of the cans shown in Duane or Martin, and the cutting line shown in Braly all of record.

PIERCE, Act'g Exr.

(Paper No. 12, Amendment "E," June 25, 1912.)

Responsive to examiner's letter of June 13, 1912:

In the claim, line 1, cancel "in" and insert—the—; line 3, after "having" insert—printed—; line 4, after "and" insert—a—; after "printed" insert—coupon and other useful printed—; line 8, after "label" insert—also—; line 9, after "thereon" insert a comma; at end of claim add—and the coupon detached therefrom in an unmutilated condition—

REMARKS.

The claim in this application has been further limited so as to recite specifically the invention as illustrated and described and is now thought to clearly differentiate from any of the references cited and even from a combination of such references as are cited by the Examiner as anticipations.

The examiner states in his letter of rejection that the claim is rejected on Hosmer in view of three other patents all of record. The patent to Hosmer is for an

advertising device which consists of a specially formed milk container provided with an annular counter sunk space for the reception of an annular cover divided into two parts and formed of glass or other transparent material. It is provided for the advertising matter to be placed next to the bottle and on the outer face of which the advertising occurs. It is noted that in this construction that he does cement the two ends together. This is done partly for the reason that the semi-circular covers 8 protect the same and prevent detachment therefrom. The reason applicant laps his ends together and pastes only 6-6 and does not paste the label to the outer surface of the can is for the purpose of detachment so as to utilize the back on the label on which receipts are printed and whereby the coupon may readily be detached in the whole condition. This certainly is not the purpose of the Hosmer device. The other devices of Duane, Brady and Martin show caps which may be detached by cutting from the body of the label, but none of them show the construction called for by applicant in its entirety.

Examiner, in order to reject applicant's limited claim has had to anticipate it by several separate patents to show the structure called for by applicant's claim. Even this combination is not exactly shown and certainly is not shown as called for by the single limited claim.

The practice of rejecting a structure by several patents is condemned by the courts as witness the following decision:

"The existence of each and every part of complainant's structure in some one or more prior de-

scriptions or structures will not amount to such anticipations as to defeat his patent unless substantially his arrangement is found in some one of them operating in the same way to produce substantially the same result."

Weston Electrical Instrument Co. v. Jewell *et al.*, 128 F. (939 N. Y.).

As the claim is now amended to the precise structure illustrated as a new article of manufacture, it is thought that the examiner should pass the case to an allowance. Such action is now expected.

(Paper No. 13, Rejection, July 24, 1912.)

In response to the amendment filed June 25, 1912:

The claim is rejected on the references and for the reasons of record.

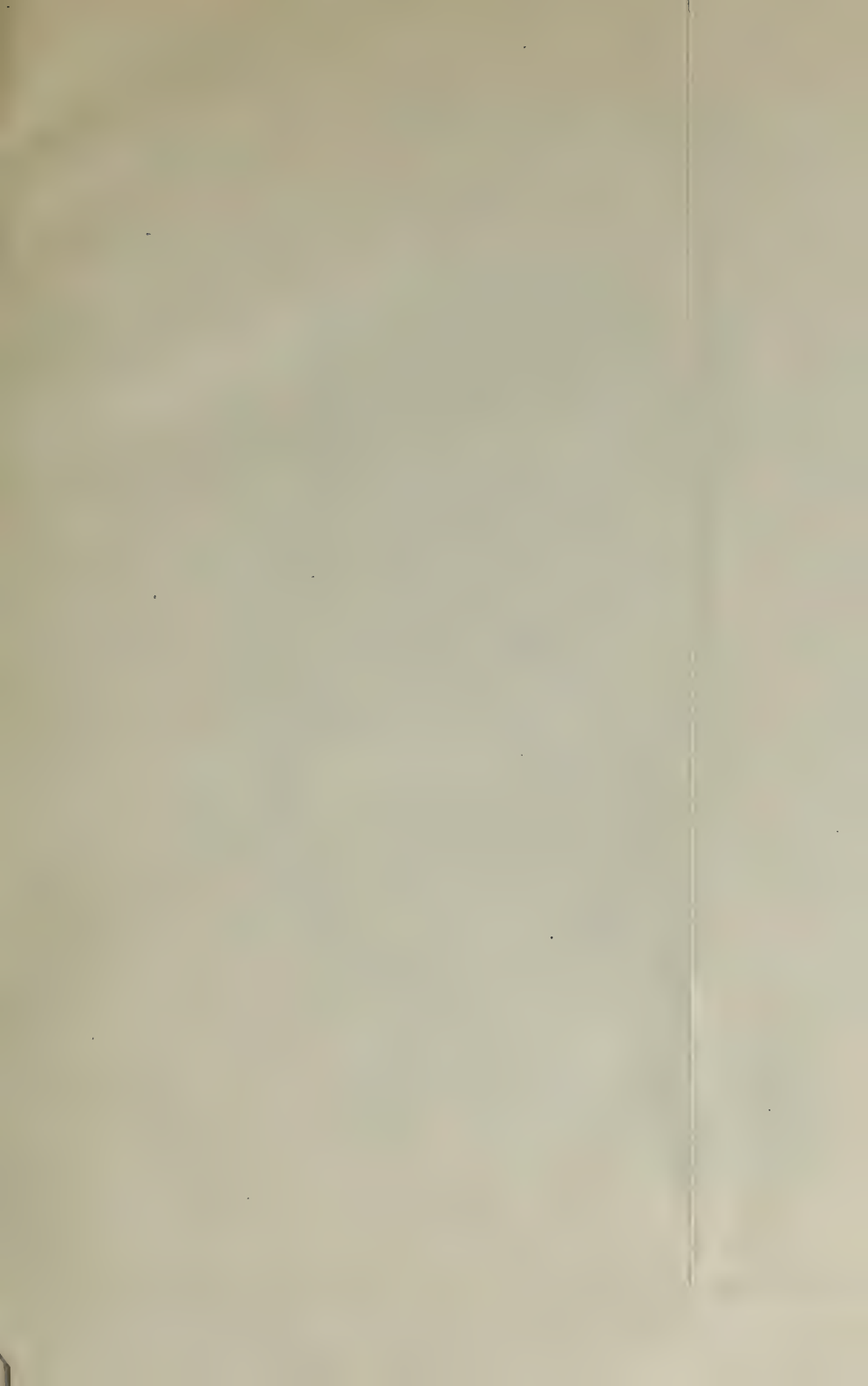
G. P. TUCKER, Exr.

(Paper No. 14, Letter to Office, Nov. 23, 1912.)

In response to the office action of July 24, 1912:

Examiner is respectfully requested to apply the references on the amended claim. As far as applicant's attorneys can discern it absolutely differentiates from any of them, singly or collectively.

[Endorsed]: Cole vs. Hookstratten etc. No. C-3 Eq. Def. Exhibit No. A. Filed Nov. 17, 1916. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk.



L. M. COLE.

LABEL.

APPLICATION FILED AUG. 8, 1911.

1,054,826.

Patented Mar. 4, 1913.

Fig. 1.

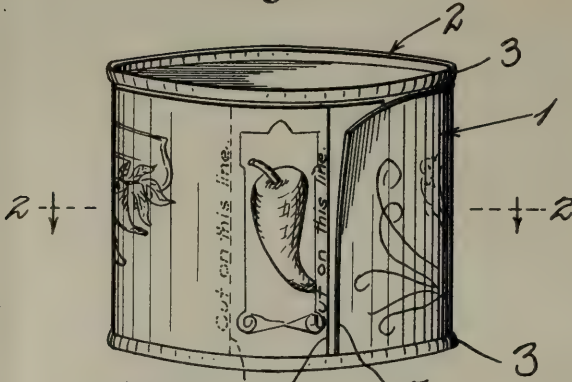


Fig. 2.

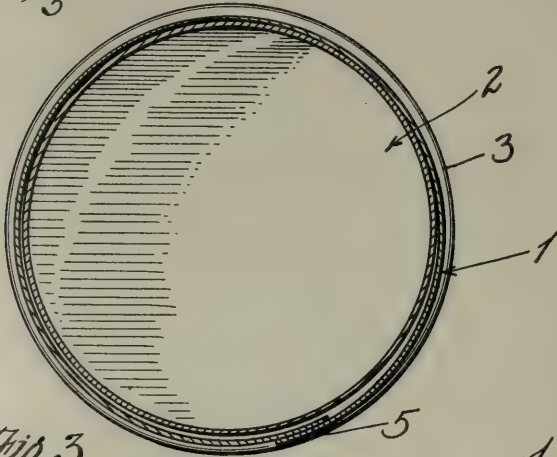
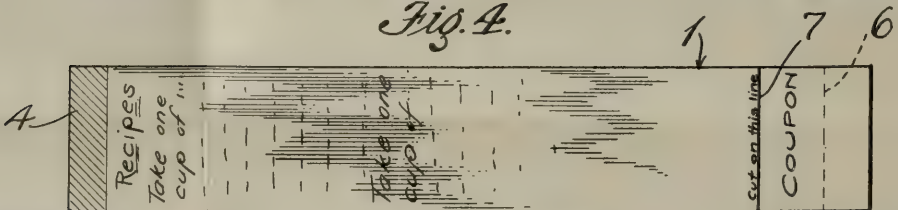


Fig. 3.



Fig. 4.



Witnesses.

E. R. Ballard
C. Deverance.

By

Inventor.
Louis M. Cole.

Harold Thouse.

Attys.

UNITED STATES PATENT OFFICE.

LOUIS M. COLE, OF LOS ANGELES, CALIFORNIA.

LABEL.

1,054,826.

Specification of Letters Patent.

Patented Mar. 4, 1913.

Application filed August 8, 1911. Serial No. 643,055.

REISSUED

To all whom it may concern:

Be it known that I, LOUIS M. COLE, a citizen of the United States, residing at Los Angeles, in the county of Los Angeles and State of California, have invented new and useful Improvements in Labels, of which the following is a specification.

This invention relates to improvements in labeling means for receptacles, cans or the like.

It is an object of the invention to provide a label upon a goods inclosing receptacle which is adapted to contain advertising matter properly exposed to view and which is also adapted to have placed thereon information, recipes or other data, which may be exposed to view when desired for use.

It is an object of the invention to provide a receptacle with a movably mounted label having impressions upon both sides thereof for indicating certain data.

In the accompanying drawing forming a part of this specification, Figure 1 is a perspective view of a can suitable for containing any line of goods, the said can having the improved movable label mounted thereon. Fig. 2 is a transverse sectional view through the can taken upon the line 2—2 of Fig. 1 but showing the can upon an enlarged scale. Fig. 3 is a plan view of the label employed, the same being flattened out as before applying to the can, the outside of the label being shown. Fig. 4 is a similar plan view showing the inside of the label.

The details of the invention will now be more particularly described, reference being had to the drawing in which—

1 indicates a label which is usually made of paper and is provided on the outside with any desired configurations, artistic designs or wording to represent the goods which is to be inclosed in the can or receptacle to which the label is applied.

2 indicates a can of ordinary construction having projecting edge flanges 3 at its upper and lower ends for limiting the movement of the label thereon and preventing it from slipping from place.

The label is provided with a gummed portion on the inner surface of one end thereof as at 4 which is adapted to lap over the other end thereof when the label is applied to the can so as to be made to adhere thereto for fastening the end of the label together, as indicated at 5 in Fig. 2. The gummed portion of the label is so arranged that when

the ends are fastened together the label will not adhere to the can or receptacle at any point but will be loosely mounted thereon as shown in Fig. 2. The said label is also provided with a line or indicating mark 6 upon its outer surface showing where the label is to be cut for removing it and the words "Cut on this line" may be arranged adjacent thereto. The line for cutting the label is preferably located to one side of the lapped ends so that the cut need only be made through a single thickness of the paper or other material of which the label is composed.

The inner surface of the label is provided with various data and printed matter, which it is desired to convey to the purchaser of the goods, for instance a portion of said label on its inner surface is provided with printed matter indicating that it is a coupon, one or more of which if saved and presented to the company selling the goods will command some kind of a premium. The inner surface of the said label is provided with a line 7 indicating where the same should be cut to sever the coupon therefrom. The remaining portion of the label upon its inner surface is preferably provided with desirable data such for instance as recipes for preparing the material contained in the can if it be food or for cooking generally or for setting forth any other desirable or useful information.

The label thus forms a desirable addition to the receptacle not only because of its advertising qualities in setting forth the properties of the goods for the merchant or distributor, but also because of the information, coupons or the like which is obtained by removing and preserving the said label.

It will be understood that a label of this character may be applied to various kinds of receptacles, cans or the like in which goods are packed so that said label may be movably placed thereon and capable of being removed for the purposes above set forth.

What I claim is:

As a new article of manufacture, the combination with a cylindrical can provided on its upper and lower edges with retaining flanges, of a label having printed display matter on the outer surface and a printed coupon and other useful printed matter on the inner surface thereof, the ends of said label being so arranged that when

upon said can, said label being free to move in a circular direction on said can but prevented from vertical movement by the flanges of the can, said label also being provided with a vertically disposed cutting line thereon, whereby when a label is cut on said line it can be removed from the can so that the printed matter can be read on the concealed side of the label and the coupon de-

tached therefrom in an unmutilated condition. 10

In witness that I claim the foregoing I have hereunto subscribed my name this 2nd day of August, 1911.

LOUIS M. COLE.

Witnesses:

EDMUND A. STRAUSE,
EARLE R. POLLARD.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

REISSUE PATENT NO. 14,000, LOUIS M. COLE.

Labels. Application executed Dec. 19, 1914. Filed complete Dec. 26, 1914. Ser. No. 879,221. Examined by A. P. Shaw, Sep. 24, 1915. Notice of allowance Sep. 28, 1915. Reissued Oct. 26, 1915. Attorneys, Hazard & Strause, Los Angeles, California. Sub. attorney, Edmund A. Strause, Los Angeles, California.

Original patent No. 1,054,826, dated March 4, 1913.

CONTENTS.

APPLICATION.

1. Rejection, Jan. 2, 1915.
2. Sub. power, March 29, 1915.
3. "A" and Exh., April 3, 1915.
4. Rejection, April 17, 1915.
5. B and Exh., June 2, 1915.
6. Rejection, June 12, 1915.
7. "C," June 22, 1915.
8. Rejection, July 6, 1915.
9. Amendment D, July 19, 1915.
10. Office letter, Sept. 8, 1915.
11. Req. recons., Sept. 20, 1915.

Classification: 40-2.

(In the petition applicant's P. O. address is given as 231 Central Ave., Los Angeles, Cal.)

(The specification is without change.)

CLAIMS:

1. As a new article of manufacture, the combination with a cylindrical can provided on its upper and lower edges with retaining flanges, of a label having printed display matter on the outer surface and a printed coupon and other useful printed matter on the

inner surface thereof, the ends of said label being pasted together when mounted upon said can, said label being free to move in a circular direction on said can but prevented from vertical movement by the flanges of the can, said label also being provided with a vertically disposed cutting line thereon, whereby when a label is cut on said line it can be removed from the can so that the printed matter can be read on the concealed side of the label, and the coupon detached therefrom in an unmutilated condition.

2. As a new article of manufacture, the combination with a container, of a label for said container having display matter relating to the contents of the container on its outer face, the inner face of said label bearing a plurality of printed directions for preparing the contents of said container, said label being provided on its outer face with a vertically disposed line indicating the point where said label should be severed to remove the same from the container without mutilating the directions on the obverse side of said label.

3. As a new article of manufacture, the combination with a package, of a wrapper for said package having display matter relating to the contents of the package on its outer face, the inner face of said wrapper bearing useful printed matter, said wrapper being provided on the outer face thereof with means indicating where the wrapper may be detached from the package without mutilating the printed matter on its inner face.

OATH.

State of California, County of Los Angeles—ss.

Louis M. Cole, the above named petitioner, being

duly sworn, deposes and says: that he doth verily believe himself to be the original and first inventor of the improvements set forth and claimed in the foregoing specification for which improvement he solicits a patent; that deponent does not know nor does not believe that said improvement was ever known before or used before his invention or discovery thereof; or patented or described in any printed publication in any country before his invention or discovery thereof, or more than two years prior to his application, or in public use or on sale in the United States for more than two years prior to his application; that deponent is a citizen of the United States of America, and resides at Los Angeles, in the county of Los Angeles and state of California; that said invention has not been patented to him or to others with his knowledge or consent in this or any foreign country for more than two years prior to his application, or on an application for patent filed in any country foreign to the United States by him or his legal representatives or assigns more than twelve months prior to his application; that no application for patent on said improvement has been filed by him or his representatives or assigns in any country foreign to the United States; that deponent verily believes that the letters patent referred to in the foregoing petition and specification, and herewith surrendered are inoperative for the reason that the specification thereof is defective and that such defect consists particularly in the claims which do not cover his invention; and deponent further says that the errors which render said patent inoperative arose from inadvertence without any fraudulent or deceptive

intention on the part of deponent; that the following is a true specification of the errors which it is claimed constitutes such inadvertence, relied upon:

Deponent not being versed in the phraseology of claims, was deceived into thinking that the said claims covered his invention and protected him to the fullest extent under the law; whereas the claims are in fact faulty and erroneous in specifying the label as loose and in including the flanged construction of the can; that such errors so particularly specified arose as follows:

When deponent employed his attorneys to prosecute said application for letters patent he merely forwarded a can of edibles upon which was mounted the label, which constituted his invention without any further instruction to his attorneys other than the fact that he considered the printing of the receipts on the obverse side of the label, and a cutting line indicated on the outer face of the label, as matter that constituted his invention. As the label attached to the can loosely encircled the same, his attorneys took it for granted, in the absence of any instructions from deponent, that it was intended to be loose, whereas, as a matter of fact, modern labeling machines were so constructed that a corner of the label was stuck to the can during a labeling operation, thereby rendering it immovable, and consequently rendering the retaining flanges at the top and bottom of the can practically useless. The allowed claim is, therefore, faulty and erroneous in

that it is of insufficient scope to properly cover the applicant's invention.

LOUIS M. COLE.

Executed Dec. 19, 1914.

(Seal)

MARGUERITE BATES,
Notary Public.

(Paper No. 1, Rejection, Jan. 2, 1915.)

Claim 1 is allowed.

Claim 2, line 7, "the point" should be canceled.

Claim 2 is rejected on

Martin, 1,004,005, Sep. 26, 1911, (40-2) in view of
Braly, 589,406, Sept. 7, 1897, (40-4) and the vertical
lines in

Schwab, 581,494, April 27, 1897, (40-3).

The nature of the printed matter is immaterial to the
patentability of the device.

Claim 3 is rejected on Martin with Braly.

A. P. SHAW, Ex'r.

(Paper No. 2, Sub. Power of Atty., April 29, 1915.)

(All former powers are revoked and E. A. Strause
appointed attorney.)

(Paper No. 3, Amendment A & Ex., April 3, 1915.)

(This paper is dated "Mail Room, Mar. 22, 1915,
U. S. Patent Office," and "Patent Office, Mar. 23,
1915, Div. 35, Filed," and both of these date stamps
are "Cancelled and Paper Returned.")

Examiner's letter of Jan. 2, 1915, received.

Claim 2, line 4, cancel "a plurality of" and substi-
tute—useful—; line 4, cancel "directions x x x x con-

tainer" and substitute—mater—; line 7 cancel "the point"; line 8 cancel "same" and insert—entire label—; line 9 cancel "the" and insert—its—; same line cancel "of said label."

Claim 3, line 6, before "wrapper" insert—whole—
REMARKS:

Claims 2 and 3 have been amended so that they absolutely differentiate from any of the references cited by the examiner, either singly or collectively, and for that reason they are thought to be clearly allowable. The examiner's attention is directed to the fact that in order to be useful, applicant's label would have to be detached or removed from the can in its entirety, and herewith enclosed find two labels, one of the labels being used by the Royal Packing Company and the other being used by the Southern California Fish Company. The label of the Royal Packing Company is a licensed label, while the label of the Southern California Fish Company was until recently an infringement, it now being licensed under applicant's original patent. From an examination of these labels, and especially the one used by the Southern California Fish Company, the examiner will note that the two ends are secured together, the white portion at one end indicating where the paste is applied. When this label is severed on the white line it is removed in its entirety, so that the recipes printed on the back thereof are not in the slightest degree mutilated.

Examiner's attention in connection with his rejection on a number of patents is directed to the well known decision of the Weston Electrical Instrument Co. vs.

Jewell, *et al.*, 128 F. 938, N. Y., in which the court held as follows:

"The existence of each and every part of complainant's structure in some one or more prior descriptions or structure will not amount to such anticipations as to defeat his patent unless substantially his arrangement is found in some one of them operating in the same way to produce substantially the same result."

Numerous other decisions along the same line have been handed down from time to time by the same court.

In view of the fact that applicant has differentiated from the references cited, which do not show labels with useful printed matter on its obverse side that could be removed entirely from the container, it is believed that the claims are now allowable, and such action is now expected.

(Note attached dated April 3, 1915:)

The revocation of power of attorney in this application was filed three or four days after the receipt of the enclosed amendment, Edmund A. Strause being appointed as attorney.

EDMUND A. STRAUSE, Atty.

(Paper No. 4, Rejection, April 17, 1915.)

Responsive to the communication filed April 3, 1915.
Claim 1 is allowed.

On review, it is noted that claim 2, line 6, "vertically" is indefinite, since the position of the label or the container is not specified.

Claim 2, so far as definite, and claim 3 are rejected on Martin of record in view of

Harnsheim, 527,687, Oct. 16, 1894, (40-21) in which the whole wrapper is removed.

A. P. SHAW, Ex'r.

(Paper No. 5, Amendment B & Ex., June 2, 1915.)

Examiner's letter of April 17, 1915, has been carefully considered.

Claim 2, line 6, erase "vertically"; line 7 erase "disposed" and after "line" insert—disposed in parallel relation to the vertical axis of said container—

Claim 3, line 5, erase "means" and insert—a printed line—

REMARKS:

Applicant has again carefully considered the patent to Martin, *et al.*, and does not find therein the construction as called for by applicant's claims. Martin does not show that the whole wrapper is removed from the container, and the patent to Harnsheim for a cigar band is not thought to be in point.

It certainly would require a stretch of imagination to put the two patents cited together so as to form applicant's novel structure. As heretofore set forth in various arguments Martin's improvement consists in forming on a label a trading stamp which may be detached therefrom. He used the ordinary perforations so as to render it easy of detachment. The idea of perforating portions of wrappers so that one part may be detached from the other "is as old as the hills." Also checks have been perforated so as to separate them from their stamps from time immemorial.

Martin further states that his sole object in printing on the obverse side of the label a representation of a trading stamp illustrated in the front part and directly behind the same is so that the greasy or wax side may be placed outward when pasting the trading stamp in a book. See line 81 of his specification down to 96. In this connection the examiner's attention is directed to the fact that the citation of Martin is the only one in which the obverse side of a label has been shown containing printed matter of any kind.

To bring to the examiner's attention and to illustrate the value of applicant's improvement, applicant desires to state that the Southern California Fish Company has been licensed under his original patent to use the invention. Furthermore, number of other canned goods manufacturers are infringing on applicant's rights, and applicant is herewith enclosing a label taken from a can of tuna put up by the White Star Canning Company of this city, which is a deliberate and willful infringement. These different matters are cited to the examiner to show him and to bring out the value of applicant's invention and to bring out the further fact that what he has accomplished is invention.

If the examiner should deny what applicant considers to be his rights he will not be able to have his day in court so as to have his patent fully adjudicated in the light of all the evidence obtainable.

From the above and for the further reason that the claims absolutely differentiate from the references cited, it is thought that the examiner should allow the case as it now stands and such action is now expected.

(Paper No. 6, Rejection, June 12, 1915.)

Responsive to the communication filed June 2, 1915.

On review, the claims are rejected as covering unpatentable combinations. There is no invention in placing a label on a can and the ordinary can has retaining flanges on its upper and lower edges. The claims should be directed to a label adapted to be secured on a can, etc.

The term "wrapper" in claim 3 is objected to; this term is ordinarily used to mean a device that covers the entire can, instead of only its curved sides; as applied to the device disclosed by applicant the term is inapt; to give it a meaning broader than that belonging to the term "label" would make the claim unwarranted. In line 6 of this claim, the expression "where the whole wrapper may be detached" is objected to as inaccurate, this line denotes a place where the wrapper may be severed to remove the entire wrapper.

Claims 2 and 3 should state the label is not fastened to the can; otherwise they are subject to rejection as functional in the statement that the entire label may be removed.

The claims are not otherwise objected to.

A. P. SHAW.

(Paper No. 7, Amendment C, June 22, 1915.)

Examiner's letter of June 12, 1915, considered.

Cancel the claims, and substitute:

1. As a new article of manufacture, a label adapted to be detachably fastened on a can provided on its upper and lower edges with retaining flanges, said label having printed display matter on the outer sur-

faces and a printed coupon and other useful printed matter on the inner surface thereof, the ends of said label being pasted together when mounted upon said can, said label also being provided with a vertically disposed cutting line thereon, whereby when a label is cut on said line it can be removed from the can so that the printed matter can be read on the concealed side of the label and the coupon detached therefrom in an unmutilated condition.

2. As a new article of manufacture, a label adapted to be detachably secured to a container, said label for said container having display matter relating to the contents of the container on its outer face, the inner face of said label bearing useful printed matter, said label being provided on its outer face with a line disposed in parallel relation to the vertical axis of said container where said label should be severed to remove the entire label from the container without mutilating the matter on its inner side.

3. Claim 3 of patent with changes shown.

REMARKS.

Claims 1, 2 and 3 have been rewritten to state a label adapted to be detachably secured to a can, overcoming the rejection of stating the combination of a label and a can. An immaterial limitation has been cancelled from claims 1 and 3. It is believed that the claims are now in good form and therefore allowable.

(Paper No. 8, Office Letter, July 6, 1915.)

Responsive to the communication filed June 22, 1915.

In the claims, "mutilated" should be —mutilated—; "mutiliating" should be —mutilating—.

Claim 1, line 2, "on " is misleading; the label is not fastened on the can. The following changes in this claim are suggested;—line 2, change "on" to —around— Line 3, after "flanges" insert —by fastening the ends of the label together— Lines 5-7, cancel "the ends—can"; line 7, change "vertically" to —transversely— as the cutting line is vertical only when the can is vertical; line 8, change "a" to —the— The claim should bring out that the label is not directly attached to the can; as it now stands it is functional; since the ordinary label even tho cut transversely cannot be removed from the can without mutilation; the claims should also develop that the cutting line is so placed that it is out of registry with the printed matter and coupon on the label; otherwise the cutting of the label would mutilate the coupon or the label proper. The claim is, in its present form, rejected as functional.

Claim 2, line 2, "to" should be —around— Line 7, "vertical" should be canceled, since the axis is vertical only in a special position of the container; before "where" should be inserted —indicating— Last line, "obverse side" should be —inner face— Cl. 3, line 2, "to" should be —around—

A. P. SHAW.

(Paper No. 9, Amendment D, Jul. 19, 1915.)

Examiner's letter of July 6, 1915, considered.

Claim 1, line 8, after "thereon" insert

—out of registry with said printed coupon and other printed matter—

Claim 2, line 7, cancel "to the vertical axis of said container" and insert —transversely thereto and out of registry with said useful printed matter indicating—

(Other amendments to cls. 1 and 2, shown on p. 10 hereof.)

Claim 3, line 2, cancel "to" and insert —around—
Line 6, after "line" insert —out of registry with said
useful printed matter— Line 7, correct spelling of
"mutilating."

REMARKS:

Claims 1, 2 and 3 have been amended in accordance with the suggestions of the office, and it is believed are now in condition for allowance.

(Paper No. 10, Rejection, Sep. 8, 1915.)

Responsive to the communication filed July 19, 1915:

On reconsideration, it is observed that the three claims in the case are drawn to the same subject-matter as were some of the claims canceled from the original application. Claims 2 and 3 are substantially the same as claim 1 filed in the original case by amendment dated Oct. 30, 1911, and canceled by amendment dated Jan. 2, 1912, as a result of a rejection on references by the office letter dated Nov. 25, 1911. Claim 1 is for substantially the same subject-matter as original claim 3 in the former application which claim was canceled as the result of a rejection.

In view of the above, applicant is not entitled to the three claims that are at present in the case; see the following decisions:

Leggett v. Avery, 17 O. G., 445;

Dobson v. Lees, 53 O. G., 1740;

Yale Lock & Mfg. Co. v. Berkshire National Bank, 51 O. G., 1291, and

Corbin Cabinet Lock Co. v. Eagle Lock Co., 65 O. G., 1066.

The claims are accordingly rejected.

A. P. SHAW.

(Paper No. 11, Request for Reconsideration, Sept. 20, 1915.)

Examiner's letter of Sep. 8, 1915, considered.

The examiner will note by referring to the affidavit accompanying the application for reissue, that the error in the specification consisted in specifying the label as loose, whereas, as a matter of fact, modern labelling machines were so constructed that a corner of the label was stuck to the can during the labelling operation. The reissue was admitted on these grounds.

The claims now in the case are not substantially the same as claim 1, filed in the original application by amendment dated Oct. 30, 1911. The distinction between the present claims and claim 1 above referred to brings out the difference between loosely placing the label on the can, and securing the label to the can by means such that it can be detached, as for illustration, by pasting one corner. The claim in the original application referred to by the Examiner recites in the fifth line "said label being loosely held in position." In the present claims the label is recited as being "detachably fastened around a can or container." The present claims are also more specific in stating that the cutting line is transversely disposed on the label.

If there is any reason for admitting a reissue application on the grounds stated in the affidavit, then the claims as worded at present distinguish from any claims in the original application.

The examiner is requested to reconsider his action in view of the above argument, and it is thought he will find the case now in condition for an allowance.

[Endorsed]: Cole vs. Hookstratten. No. C-3 Eq. Def. Exhibit No. B. Filed Nov. 17, 1916. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk.

141

Cole and Hickstruth	NO. C-38
EXPENDIT	
P.O. C	1916
TOD. NOV. 17	
W. M. VAN DYKE, Clerk	
DEPT. OF AGRICULTURE	
DEPT. OF AGRICULTURE	

(No Model.)

F. KOEWING.

FASTENING TOGETHER PAPER DRESS PATTERNS.

No. 371,144.

Patented Oct. 4, 1887.

Fig. 1.

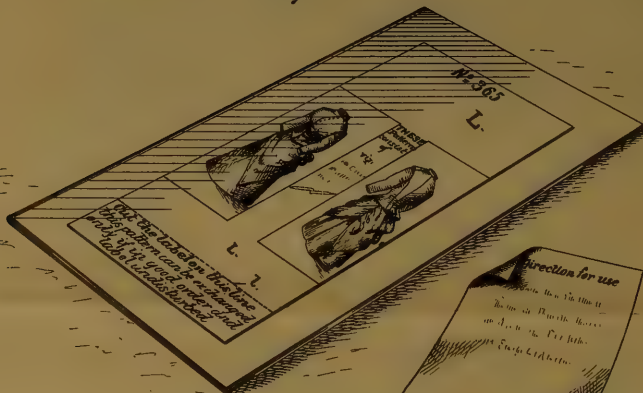
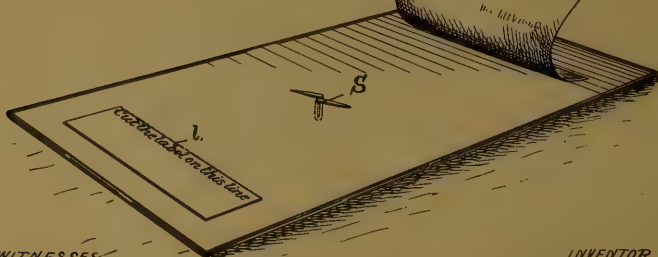


Fig. 2.



WITNESSES

John Decker
James H. Law.

INVENTOR

Frank Koewing
by Thomas S. Baupford
Attorney.

UNITED STATES PATENT OFFICE.

FRANK KOEWING, OF NEW YORK, N. Y.

FASTENING TOGETHER PAPER DRESS-PATTERNS.

SPECIFICATION forming part of Letters Patent No. 371,144, dated October 4, 1887.

Application filed May 24, 1887. Serial No. 280,250. (No model.)

To all whom it may concern:

Be it known that I, FRANK KOEWING, a citizen of the United States, and a resident of New York city, in the county of New York and State of New York, have invented certain new and useful Improvements in Fastening together Paper Dress-Patterns, of which the following is a specification.

My invention refers to paper dress patterns as they are folded for sale, and is an improvement in the method of fastening the folded package and securing it so it cannot be unfolded or opened without tearing or cutting part of the package.

In the drawings illustrating my improvement, Figure 1 is a view of the pattern as folded and secured, showing the label attached to the front or face of the package. Fig. 2 is a view of the package with the label detached at its lower end and turned over so as to expose the directions on the under side, and showing the staple or fastening by which the package is secured.

Paper dress-patterns in the form in which they are sold are usually folded so as to form an oblong package, which is secured either by the employment of a sealed envelope or fastened together by a pin put through the several parts before the pattern is folded, and on the front side or face of which folded package is pasted the label which contains the cut or representation of the garment and the necessary directions for using the pattern. By the latter method of folding and securing the pattern the expense of an envelope or cover is avoided, and can be readily and easily opened and used without destroying the label. As the paper dress-pattern where a label has been used has been fastened heretofore, a pin or fastener was put through all the pieces before folding and the ends clinched or turned down in the center, and then the pattern was folded, having no other security to keep it folded, and offering no further protection against being unfolded, examined, and copied. As thus secured it has been possible, by merely unfolding the package and turning back the point of the pin or staple, to unfold the pattern and examine and copy the same, and afterward secure and fold the pattern as before, and without indicating in any way that the pattern had been opened. It is advan-

tageous to dealers in this class of goods to allow the patterns to be exchanged if they have not been opened or used; but as patterns have been heretofore secured or fastened it has been impossible to tell by the appearance of the package whether they have been opened or not, and a pattern may have been unfolded, examined, and even used, and then secured and refolded as though it had not been opened, leaving no check against imposition, except by refusal on part of the seller to make any exchange whatever. My improvement is designed to avoid this objection, and at the same time secure to the purchaser the right to return an unfolded pattern, which I accomplish by so securing the contents of the package that it cannot be opened or examined in any way, except on the surface, without that fact being indicated by the appearance of the package.

In my improved method of securing the folded package the staple or fastener is put through the pattern, when folded, from the back or under side, or so that the head of the staple is at the back, and the ends that are turned down are on the front side, as is seen at Fig. 2. After the staple or fastener is put through the package and secured, the label containing the necessary printing, the cuts of the patterns, and directions for using is pasted or attached by both ends, and, where necessary, along the edges to the front side of the package over the turned-down ends of the staple S, as shown in Fig. 1.

As will be understood from the drawings, when it is desired to open or unfasten the staple, it will first be necessary to remove the label from the package at the lower end and edges, so as to obtain access to the ends of the staple at S. After the label is detached or severed from the package at the lower end, it is raised or thrown back, and the ends of the staple are readily unfastened or opened and the package unfolded and examined or used. When the label has once been severed from the package, it is impossible to again attach it to the latter as it was before it was detached, and thus it will be seen that when the package has once been opened it cannot be refastened and secured in the condition it was before being opened and without indicating that it has been opened. The label must be so

5 pasted or fastened to the package as to prevent the hand being placed under the label while the latter is secured to the package and the ends of the staple opened, and thus the object of my improvement defeated. To detach the label from the package, it may be cut near the end just beyond where it is secured to the pattern; but I prefer to provide a line of perforations or dots near the lower end of the label, as shown at 1, by means of which the end of the label may be readily torn off or cut from the pattern and the label not be injured in any manner.

15 The label may be the ordinary label used with paper dress-patterns, containing the usual printing and cuts of the garment; but I prefer the label shown in the accompanying drawings. In the label L, as there shown, the directions for using the pattern are printed on the underside of the label, as will be seen from Fig. 2, and the front of the label is used for the cuts or representation of the garments and necessary printing. As thus printed, the label itself forms an added security against using the pattern, because, though the package may be opened without detaching the label, in order to read the directions for using the pattern it is necessary to detach one end of the label, when it is impossible to again fasten the label to the package, as before stated. Moreover, by thus printing the label, as both sides of the latter are utilized, fuller directions may be given, and the representations of the garment may be larger or more numerous, owing to the greater space obtained by using both sides of label.

40 With my improved method of fastening the patterns, particularly when used with my improved form of label, it is impossible to open the package or examine the pattern without indicating at once that the same has been opened, and more space is obtained for the representation or cut of the garment and for the necessary directions.

45 What I claim as new is—

1. In paper dress-patterns, the combination, with the pattern folded into a package, of the staple placed through the pattern from the back and turned down or clinched on the front of the package, and of the label attached by both ends to the front side of the package, so as to cover the turned-down ends of the staple, substantially as and for the purposes set forth.

2. In paper dress-patterns, the combination, with the pattern folded into a package, of the staple placed through the pattern from the back and turned down or clinched on the front of the package, and of the label attached by both ends and along the edges to the front side of the package, so as to cover the turned-down ends of the staple, substantially as and for the purposes set forth.

3. In paper dress-patterns, the combination, with the pattern folded into a package, of the staple placed through the pattern from the back and turned down or fastened on the front side of the package, and of the label having the directions printed on the under side and attached by both ends to the front side of the package, so as to cover the turned-down ends of the staple, substantially as and for the purposes set forth.

4. In paper dress-patterns, the combination, with the pattern folded into a package, of the staple placed through the pattern from the back and turned down or fastened on the front side of the package, and of the label having the directions printed on the under side and attached by both ends and along the edges to the front side of the package, so as to cover the turned-down ends of the staple, substantially as and for the purposes set forth.

Signed at New York city, in the county of New York and State of New York, this 17th day of May, A. D. 1887.

FRANK KOEWING.

Witnesses:

MICHAEL FENNELLY,
FRANK H. SMILEY.

No. 709,464.

Patented Sept. 23, 1902.

J. BROACH & G. W. GOODRICH.

DRESS PATTERN SEAL.

(Application filed June 17, 1902.)

(No Model.)

Fig. 1.

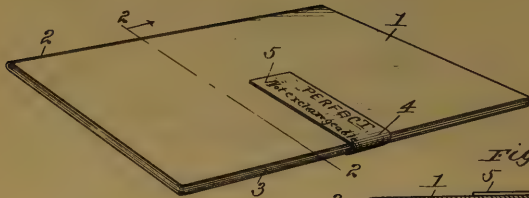


Fig. 2.

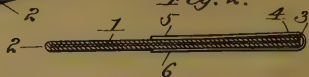


Fig. 3.

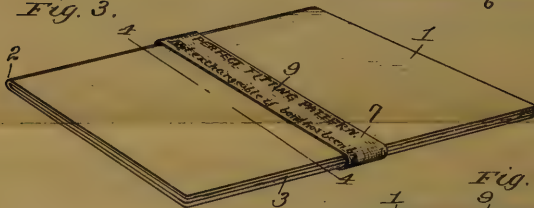


Fig. 4.



Fig. 5.

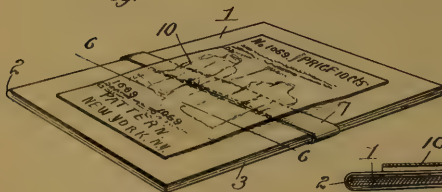
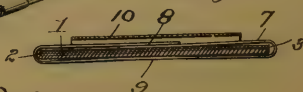


Fig. 6.



WITNESSES

J. W. Crumwell
Attorney at Law

J. Broach
G. W. Goodrich

INVENTORS.

By

Daniel Davis

ATTORNEYS.

Cole	No. C-36
Archer	
Def. EXP. 100	
Nov. 17	1916
U.S. DEPT. OF AGRICULTURE	
BUREAU OF PLANT INDUSTRY	

UNITED STATES PATENT OFFICE.

JOHN BROACH AND GEORGE W. GOODRICH, OF NEW YORK, N. Y.,
ASSIGNORS TO THE INDEPENDENT PATTERN COMPANY, OF NEW
YORK, N. Y., A CORPORATION OF NEW YORK.

DRESS-PATTERN SEAL.

SPECIFICATION forming part of Letters Patent No. 709,464, dated September 23, 1902.

Application filed June 17, 1902. Serial No. 112,044. (No model.)

To all whom it may concern:

Be it known that we, JOHN BROACH and GEORGE W. GOODRICH, citizens of the United States, residing in the borough of Manhattan, county of New York, city and State of New York, have invented certain new and useful Improvements in Dress-Pattern Seals, of which the following is a specification, reference being had therein to the accompanying
10 drawings, in which—

Figure 1 is a perspective view of a folded paper dress-pattern with the sealing-band in position; Fig. 2, a sectional view taken on the line 2 2 of Fig. 1; Fig. 3, a perspective view
15 similar to Fig. 1, showing the sealing-band extending entirely around the folded pattern; Fig. 4, a sectional view taken on the line 4 4 of Fig. 3; Fig. 5, a perspective view similar to Fig. 3, showing the usual dress-pattern label secured to the folded pattern and extend-
20 ing over the ends of the sealing-band and serving as a guard therefor; and Fig. 6, a sectional view taken on line 6 6 of Fig. 5.

Paper dress-patterns in the form of which
25 they are usually sold are folded to form a small rectangular package, and the folds of this package are temporarily secured together by suitable means. Dealers in this class of goods allow the patterns to be ex-
30 changed if they have not been opened; but it has been found difficult to devise a simple device for sealing the pattern-package to prevent evil-disposed persons from removing the seal and unfolding and using the pattern and
35 then refolding it to its original folded condition and resealing it. When thus resealed, the dealer cannot usually detect that the pattern has been used and he receives it in exchange for a new pattern. The loss to deal-
40 ers because of this fraudulent practice is considerable, and many efforts have been made to devise a sealing means whereby when the pattern-package has been opened it cannot
45 be resealed without bearing noticeable evidence of that fact. It is a common practice to secure the pattern in package form by means of a fine-wire staple which is put through the folds of the package, its ends

clenched or folded down against the paper. This form of fastening has many disadvantages. It may with the exercise of care be removed and, after the pattern has been used, replaced to hold the package in its original
folded position without leaving any easily- detected evidence of the fraud. It is fur-
55 ther objectionable in that if the ends of the staple are not carefully turned up the thin tissue-paper of which dress-patterns are usually made will be torn. Still another objection to this form of fastening is that it
60 punches two sets of holes through the folded pattern, and as the indicating-lines of patterns are lines of perforations of various sizes and arranged in various ways to indicate the manner of putting the garment together these
65 extra staple-perforations are apt to occur at places where their presence will create confusion, and thereby destroy the pattern.

One of the objects of this invention is to produce a sealing device simple in construction and which may be readily applied to
70 the pattern-package to effectually seal the same without in the least marring it.

Another object of the invention is to provide a seal which may be readily broken
75 without the least danger of injuring the fine tissue-paper pattern.

Referring to the various parts by numerals, 1 designates the folded pattern-packages, which as usually folded comprise two main
80 outer leaves or folds, which are integral at 2 and may be separated along the open or free edges 3 in the manner of the leaves of a book. One end of a sealing-band 4 is securely pasted or glued to the top of the package near the
85 center thereof, as at 5, and extends around the open or free edges 3 of the parts of the package, its other end being securely pasted or glued to the bottom of the folded package,
90 as at 6. When it is desired to open the package, the sealing-band is broken at the free or open edges of leaves of the package without the least danger of tearing the fine tissue-paper pattern-sheet.

Because of the peculiar nature of the fine
95 tissue-paper of which dress-patterns are

formed the glue or other adhesive which is used to secure the sealing-band to the pattern will be absorbed by it, and it will be practically impossible to unglue or loosen the ends of this band by moistening them without so injuring the pattern as to be easily detected.

In Figs. 3 and 4 the sealing-band 7 extends entirely around the package, its ends being overlapped and pasted to the package, as at 8. In this form it is simply necessary to sever the band where it extends around the free or open edges of the parts or leaves of the package. As shown in the drawings, the band 7 is pasted at one of its ends to the bottom of the package and extends thence across the free edges 3 of the parts of the package and thence around the package, its other end being overlapped and pasted or glued to the end that was first secured in place. The band midway its ends is pasted to the top of the package, as at 9. In this manner the package has a double seal—that is, in order to unfold the package without breaking the sealing-band said band must be unglued at two points, thus rendering the seal doubly effective.

In Figs. 5 and 6 the sealing-band 7 extends entirely around the package and is pasted thereto, as in Figs. 3 and 4, and as an additional security a guard sheet or strip 10 is placed transversely of the sealing-band in a position to entirely cover the ends thereof and is securely pasted to the pattern-package to prevent access to the ends of the sealing-band. By this means any attempt to unfasten the ends of the sealing-band is prevented, and should the guard-sheet be broken or torn in such a manner as to uncover the ends of the sealing-band it could be assumed to indicate that the pattern had been opened. In this form of seal it is simply necessary to sever the band at the open or free edges 3 of the parts or leaves of the package.

In the drawings the guard-sheet 10 is shown to be in the form of the usual label which is placed on pattern-packages and contains directions and other information pertaining to the pattern.

If desired, the sealing-band may be in the form of a sheet and may contain the directions for the use of the pattern and any other information it may be desirable to place thereon, care being taken that the line of severance of the sheet will be at such a point that the label will not be destroyed when the package-seal is broken.

It will thus be readily seen that this sealing means is effective and exceedingly simple, that it will not mar the pattern when being applied, and that it may be readily broken without the least danger of injuring the thin tissue-paper pattern. It will also be noted that the sealing-band protects the free or open edges of the folded pattern and holds them in contact with each other and retains the

pattern-package in a compact condition until the seal is broken.

Having thus fully described our invention, what we claim is—

1. In a paper dress-pattern the combination with a pattern formed of thin soft tissue-paper adapted to readily absorb glue or other adhesive and folded to form a package adapted to open along one of its edges, and a severable sealing-band glued to the soft tissue-paper forming said package and extending across the open or free edges of the folded parts thereof, whereby the package will be held closed until the sealing-band be broken.

2. In a paper dress-pattern, the combination with a pattern formed of thin soft tissue-paper adapted to readily absorb glue or other adhesive and folded to form a package, of a severable sealing-band extending across the free or open edges of the parts of the said package and being pasted or glued to the package, and a guard-sheet glued to the package outside of the sealing-band and extending over said band at its point of attachment to the pattern-package, for the purpose set forth.

3. In a dress-pattern, the combination with a pattern formed of thin soft tissue-paper adapted to readily absorb glue or other adhesive and folded to form a package, a severable sealing-band extending around the package and being pasted or glued thereto to hold said package folded, both ends of said band being secured to the same side of the package, and a guard-sheet glued to the package and covering the ends of the sealing-band and preventing the detachment thereof.

4. In a paper dress-pattern the combination with a pattern formed of thin soft tissue-paper adapted to readily absorb glue or other adhesive and folded to form a package adapted to open along one of its edges, and a severable sealing-band extending around said package, one end of said band being pasted to one side of the package, the band extending thence across the free or open edges of the folded parts, and thence around the package, its other end being pasted over the end that was first secured in place, the band midway its ends being pasted to the other side of the package, whereby the package is doubly sealed and the free edges of the parts of the package are held together substantially as described.

5. In a paper dress-pattern, the combination with a pattern formed of thin soft tissue-paper adapted to readily absorb glue or other adhesive and folded to form a package adapted to open along one of its edges, and a severable sealing-band extending around said package one end of said band being pasted to one side of the package, the band extending thence across the free or open edges of the folded parts, and thence around the package, its other end being pasted over the end that was first secured in place, the band mid-

way its ends being pasted to the other side
of the package, and a guard-sheet glued to
the package and covering the ends of the
sealing-band, and preventing the detachment
5 thereof, whereby the package is doubly sealed
and the free edges of the parts are held to-
gether, substantially as described.

In testimony whereof we hereunto affix our

signatures, in the presence of two witnesses,
this 16th day of June, 1902.

JOHN BROACH.
GEORGE W. GOODRICH.

Witnesses:

CHARLES J. HARDY,
J. B. HEMAY.



No. 643,772.

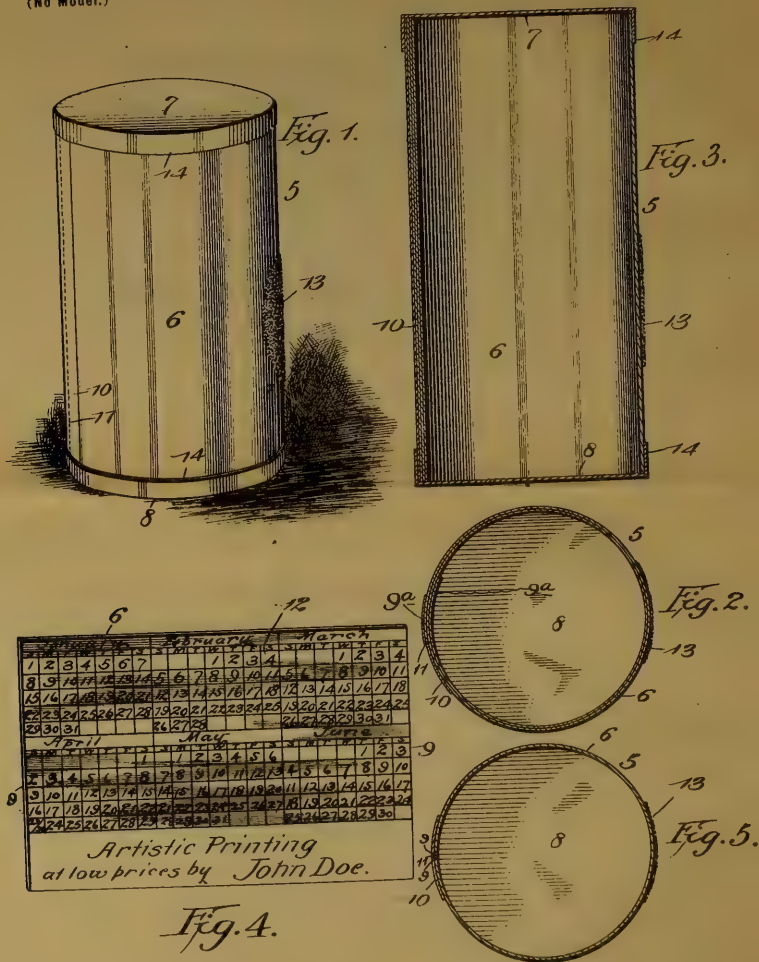
Patented Feb. 20, 1900.

W. E. MAYO.

CARTON.

(Application filed Apr. 1, 1899.)

(No Model.)



Witnesses
A. Roy Chapman
H. J. Burdick

Walter E. Mayo, Inventor.
 By *His* Attorneys.

Cashnow & Co.

Cole	} No. C-35
no	
Hochstratten	
Def.	EXHIBIT
NO.	C
Filed	Nov 17 1916
W. M. VAN DYKE, Clerk	
GEO. W. FENIMORE	
DEPUTY	

UNITED STATES PATENT OFFICE.

WALTER E. MAYO, OF CHICAGO, ILLINOIS.

CARTON.

SPECIFICATION forming part of Letters Patent No. 643,772, dated February 20, 1900.

Application filed April 1, 1899. Serial No. 711,440. (No model.)

To all whom it may concern:

Be it known that I, WALTER E. MAYO, a citizen of the United States, residing at Chicago, in the county of Cook and State of Illinois, have invented a new and useful Carton, of which the following is a specification.

My invention relates to improvements in cartons or packages for the safe transportation and handling of merchandise in general; and it is more particularly designed as a receptacle for glass articles, such as globes or chimneys for lanterns of the character disclosed in another application for patent filed by me of even date herewith.

The primary object of the present invention is to provide an improved package of the character described which is constructed in the manner to insure its ready opening and flattening out to make the package serve as a means for displaying advertisements or for other useful purposes either to the merchant who handles the articles or to the purchasers thereof.

My invention comprises a carton or package for transportation purposes consisting of a tubular body made from a piece of cardboard or other appropriate flexible material bent to cylindrical form to bring the edges thereof into proximity and having its proximate edges united by a separable strip which is adapted to be easily and quickly severed to facilitate opening the body to its flattened condition, together with removable closures fitted to the open ends of the tubular body.

To enable others to understand the invention, I have illustrated the same in the accompanying drawings, forming a part of this specification, and in which—

Figure 1 is a perspective view of a carton embodying my invention. Fig. 2 is a transverse sectional view. Fig. 3 is a longitudinal sectional view with the closures or caps fitted to the open ends of the tubular body. Fig. 4 is a perspective view of the body after its separable strip shall have been severed and the body flattened out to a sheet-like condition. Fig. 5 is a cross-section of another embodiment of the invention.

The same numerals of reference are used to indicate like parts in each of the several figures of the drawings.

The carton or package is indicated in its en-

tirety by the numeral 5; and it consists of the tubular body 6 and the closures 7 8, which are fitted removably to opposite ends of said body. The body is made of a single piece of flexible material, such as pasteboard or cardboard, or it may be made of light sheet metal. In making the tubular body a piece of material of the proper character and of suitable size is selected, and this material is bent or rolled into cylindrical form to bring the side edges 9 of said material into abutting relation, as clearly shown by Fig. 5. The proximate edges of the tubular body are united securely together by a separable strip of an easily-breakable nature 10—as, for instance, a strip of paper—and this separable strip is cemented or otherwise united to the body near its abutting edges. The separable strip is provided with a longitudinal score or crease line 11, along which a sharp instrument, such as a knife, may be drawn for the purpose of dividing the strip adjacent to the abutting edges 9 of the tubular body.

Before the body 6 is produced by rolling it into the tubular form and attaching the separable strip thereto the material of the body is prepared to adapt it for service by the merchant as an advertising medium, or it may be equipped with a friction-surface to be used by the purchaser of the article as a medium for igniting matches. As shown by Fig. 4, the body is inscribed or printed upon one side with advertising matter or with a calendar-chart, as at 12, and the body is furthermore provided upon the opposite side with the friction-surface 13, of sandpaper or analogous material, adapted to serve as the match-igniter.

The closures 7 and 8 are provided with rims or flanges 14, and said closures are fitted to opposite ends of the tubular body for the flanges thereof to take over and protect the ends of the fastening-strip 10 and to have tight frictional engagement with said body in order to hold the closures connected firmly thereto. Each closure may be constructed of paper, cardboard, or other analogous material; but when the carton is to be used in connection with a lantern of the character disclosed in my other application the closures 7 and 8 are made of sheet metal, each struck up in a single piece, whereby the closures are

adapted to be used to form parts of the lantern structure. In the general service of the carton the closures 7 and 8 may be made of different sizes for the rim of one closure to fit into the rim of the other closure to make a metallic box adapted to a variety of useful purposes.

The carton of my invention is especially serviceable as a means for protecting articles of glassware, such as the globes or chimneys of lanterns; but I would have it understood that the carton may be used for transportation or storage purposes of merchandise in general. The carton affords protection to the articles stored or packed therein, and after the articles shall have been removed the tubular body 6 may be cut open to enable the body to be flattened out and employed as an advertising medium, or the purchaser may suspend the body in a position where the friction-surface 13 may be availed of for striking matches. The carton thus serves a twofold purpose, in that it protects the article packed therein, and after such article shall have been removed the merchant may utilize the tubular body as an advertising medium or as a calendar, or the purchaser of the article may carry away the carton and utilize the same in the manner heretofore described.

In Figs. 2 and 3 of the drawings I have shown the tubular body as made from a single piece rolled upon itself to have its edges overlap an intermediate layer of the body, and over the outside lapping edge of said body is applied the separable strip 10, the score or crease line of which is adjacent to the edge 9.

It will be understood that I do not confine myself to the use of the calendar and advertising matter as shown by Fig. 4; but in lieu of the calendar I may use an advertisement of any character whatever.

One of the advantageous features of my device is that after the carton shall have served its purposes as such a structure by protecting the article packed therein all the parts of the device may be utilized for useful purposes instead of throwing away the package. The end closures are slightly different in size, so that one closure may be fitted into the other in order to form a small box adapted to hold various small articles, while the body 6 may be ripped open and flattened out to serve as an advertising medium or as a match-igniter.

From the foregoing it will be noted that the blank or card from which the body 5 is formed

is sprung into a cylindrical shape and held strained in such a position by the separable connection or strip, so that when such connection or strip is broken the card or blank almost completely resumes its original flat condition, whereby the same may be used at once for its advertising purpose. This is true whether the body is sprung from a blank of cardboard or sheet metal, as either of these materials possesses sufficient resiliency to permit the body to spring open when the separable connection or seam is broken.

Changes in the form, proportion, size, and the minor details of construction within the scope of the appended claims may be resorted to without departing from the spirit or sacrificing any of the advantages of this invention.

Having thus described the invention, what is claimed is—

1. A carton or shipping-package comprising a flexible advertising card or sheet sprung into a cylindrical body having a longitudinal side seam extending from end to end, a temporary readily-breakable fastening-strip covering the side seam and holding the sheet strained in its cylindrical shape, and temporary closures removably fitting the open ends of the cylindrical body, substantially as set forth.

2. A carton or shipping-package comprising a flexible advertising card or sheet sprung into a cylindrical body having a longitudinal side seam extending from end to end, a temporary readily-breakable fastening-strip covering the side seam and holding the sheet strained in its cylindrical shape, and flanged closures removably fitting the open ends of the cylindrical body and taking over and protecting the ends of said fastening-strip, substantially as set forth.

3. A carton or shipping-package comprising a flexible advertising card or sheet sprung into a cylindrical body, a readily-breakable fastening-strip for temporarily holding the card or sheet sprung in the cylindrical shape, and flanged closures frictionally held upon the opposite ends of the body and respectively of different sizes, substantially as set forth.

In testimony that I claim the foregoing as my own I have hereto affixed my signature in the presence of two witnesses.

WALTER E. MAYO.

Witnesses:

J. S. CLINE,
R. C. CANTERBURY.

Fig. 1.



Fig. 2.

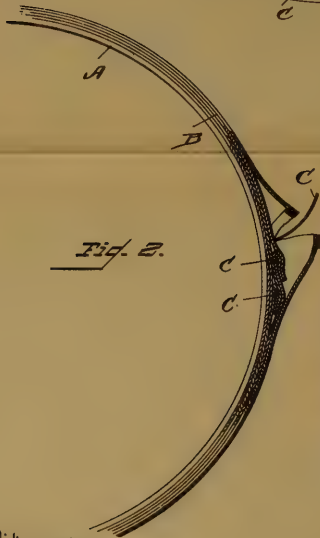
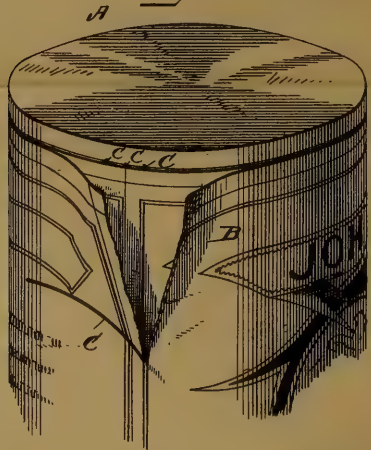


Fig. 3.



Witnesses
Wm. H. R. R. R.
E. H. Bond.

Inventor
Bernath Glick
By his Attorney
Franklin A. Hough

Cole vs Hockstratten	}	No. C-387
Def		
EXHIBIT		
No. 7		
Filed Nov 17 1906		
W. M. VAN DYKE, CLERK		
BY GEO. W. FENIMORE		
DEPUTY CLERK		

UNITED STATES PATENT OFFICE.

BERNATH GLICK, OF KANSAS CITY, MISSOURI, ASSIGNOR TO WILLIAM M. VISER, OF CLARKSVILLE, TENNESSEE.

ART OF APPLYING DETACHABLE LABELS.

SPECIFICATION forming part of Letters Patent No. 418,122, dated December 24, 1889.

Application filed July 27, 1889. Serial No. 318,892. (No model.)

To all whom it may concern:

Be it known that I, BERNATH GLICK, a citizen of the United States, residing at Kansas City, in the county of Jackson and State of Missouri, have invented certain new and useful Improvements in the Art of Applying Detachable Labels; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to the letters of reference marked thereon, which form a part of this specification.

This invention relates to certain new and useful improvements in the art of applying detachable labels, trade-marks, advertising matter, descriptive brands, and the like to boxes, cans, packages, bottles, &c.

Labels, trade-marks, brands, &c., have heretofore been pasted securely to the face of the bottle, box, or can, a single label being used in each instance, and no provision has been made for removing or changing the label. This practice has been found to be objectionable, as it not unfrequently occurs that the labels become soiled or injured in handling or transporting the cans or other packages to which they are attached. It is a recognized fact among merchants and business men who deal in canned and bottled goods that the appearance of the label has much to do with the marketing of the goods, and it frequently occurs that a merchant will find that he is carrying in stock a large quantity of canned goods for which there is no demand, for the reason that the labels upon the cans have become soiled or shelf-worn and fly-specked. In most instances of this kind the goods themselves have not deteriorated in value, but, upon the contrary, may have improved with age.

The object of the present invention is to obviate the objections above noted and to provide a means by which a series consisting of any desired or suitable number of independent labels may be so attached to the can, box, bottle, or package that when for any reason it may be found to be desirable the outer label may be removed without in any manner disfiguring or otherwise injuring the

next label in the series, thus rendering it possible to revive the attractive appearance without incurring either trouble or expense.

To the above ends and to such others as the invention may pertain the same consists in the peculiar combination, arrangement, and adaptation of parts, all as more fully hereinafter described, shown in the accompanying drawings, and then specifically defined in the appended claim.

The invention is clearly illustrated in the accompanying drawings, which, with the letters of reference marked thereon, form a part of this specification, like letters of reference indicating like parts throughout the several views, and in which drawings—

Figure 1 is a perspective view of a can provided with a series of detachable labels in accordance with my invention. Fig. 2 is an enlarged sectional detail view in which the outer label in the series is shown as partly removed. Fig. 3 is an enlarged detail perspective.

Reference now being had to the details of the drawings by letter, A designates the can-body. Secured to the surface of the can in the ordinary manner (usually by pasting) is a label. A second label, which may be in every respect a duplicate of the fixed label described in respect to its general appearance, is then drawn closely around the can. This last-described label B is not, however, provided with paste or other adhesive material, excepting that it is pasted together along its outer edges, with a small wire corresponding in length with the width of the label placed between the two adjacent edges of the label at the point at which said edges are united, as shown at C.

The wire C serves as a means for quickly and easily removing the detachable label, as will be readily understood.

It will be seen that in the manner described any number of labels may be detachably secured to the can, one being placed above the other, so that when desired the outer label in the series may be removed without in any manner injuring the remaining labels in the series.

In removing labels that have been attached in the manner above described the slightly-protruding end of the wire C is grasped and

the wire is pulled downwardly, so as to cause the same to cut or tear through the label at the point at which the ends of the same are united, and the label having been thus severed it may be readily removed from the can.

While in the foregoing specification I have described the method of attaching the detachable labels which I believe will be found to be the preferable method, still it is at once evident that the labels may be attached in a great variety of ways—such, for instance, as by pasting each label to the label beneath by a narrow line of paste or other adhesive material extending around the outer edges of the label. I do not, therefore, in this application confine myself to the particular method of attaching the labels, but contemplate, broadly, the use of a series of labels applied one upon another in such a manner as to permit the outer labels to be removed when desired without in any manner injuring the labels beneath.

If for any reason it should be considered desirable, each of the detachable labels may be provided with a line of perforations extending across the label near its end in place of the wires C, as will be readily understood.

I am aware that it has been proposed to form a blotter of a rolled web of blotting-paper with a pasted tearing-strip, each interposed between two layers of a web of blotting-paper, the edge of each strip overlapping the edge of the next succeeding tearing-strip, and I do not seek to cover such construction in this application.

Having thus described my invention, what I claim to be new, and desire to secure by Letters Patent, is—

The herein-described improvement in the art of applying labels, which consists in first pasting a label to the can or other article, next placing another label over the first-mentioned label, folding one edge upon itself to inclose a tearing-piece, and then overlapping the other edge of said label and securing it to the folded edge, substantially as described, whereby the outer edge is out of contact with the tearing-piece.

In testimony whereof I affix my signature in presence of two witnesses.

BERNATH GLICK.

Witnesses:

GORDIAN BRUCKER,

E. HAYTER.

J. MARTIN & H. FIETSCH, JR.

TRADING STAMP.

APPLICATION FILED OCT. 21, 1910.

1,004,055.

Patented Sept. 26, 1911.

Fig. 1.

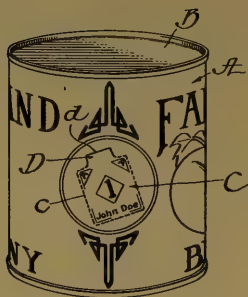


Fig. 2.



Fig. 3.

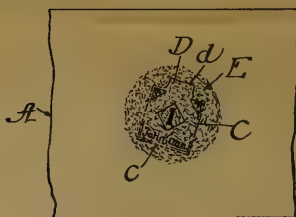
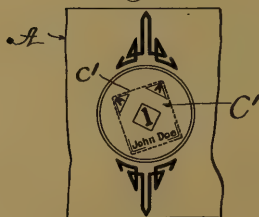


Fig. 4.



Witnesses:

J. A. Alfede
H. R. Wilkins

Inventors:

John Martin
Herman Fietsch Jr.
by Pool & Brown Attys

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vs		
Hochstetler		
Def	EXHIBIT	
	I O. S.	
Filed	Nov. 17	1906
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DEPUTY CLERK		

UNITED STATES PATENT OFFICE.

JOHN MARTIN AND HERMAN FIETSCH, JR., OF CHICAGO, ILLINOIS.

TRADING-STAMP.

1,004,055.

Specification of Letters Patent. Patented Sept. 26, 1911.

Application filed October 21, 1910. Serial No. 588,307.

To all whom it may concern:

Be it known that we, JOHN MARTIN and HERMAN FIETSCH, JR., citizens of the United States, and residents of Chicago, in the county of Cook and State of Illinois, have invented certain new and useful Improvements in Trading-Stamps; and we do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings, and to the letters of reference marked thereon, which form a part of this specification.

This invention relates to an improvement in trading stamps and consists of the matters hereinafter described and more particularly pointed out in the appended claims.

In the drawings:—Figure 1 is a perspective view of a can to which is applied a label provided with our improved trading stamp. Fig. 2 is a detail plan view of a part of the label which contains the trading stamp. Fig. 3 is a rear view of the same. Fig. 4 is a plan view of a part of a label provided with a slightly modified form of the trading stamp.

Our improved trading stamp is printed on the usual label applied to bottles, cans, cartons and the like. It is shown herein as printed on a label applied to a can.

In the drawings A indicates a label attached to a can B, and C indicates the trading stamp which is printed on the label. The trading stamp C is printed with the usual indicia indicating its value, the origin of the goods and the like.

In order that the stamp C may be detachable from the label, it is outlined by lines of perforations *c* by reason of which it may be readily torn from the body of the label.

In that embodiment of our invention illustrated in Figs. 1 to 3, the stamp is provided with a tab or extension D, the outline of which is defined by a cut through the label indicated by the unbroken line *d*, which severs the tab from the label except that portion of it which is joined to the stamp. This tab being disconnected from the label proper, it may be grasped by the thumb and fingers, so as to tear the stamp from the label along the lines of perforation.

In the construction of the label we provide means which will prevent the rear face of the stamp from adhering to the can, carton or other package to which the label is

applied. To this end we preferably print or otherwise apply to the rear surface of the label and immediately back of the stamp, an impression of a wax preparation or of some oily or greasy material which will not adhere to the paste or glue used. This impression is indicated in Fig. 3 by the reference letter E. The impression E is made large enough so that it will extend beyond the limits of the stamp in order to protect the stamp fully and prevent any part of it from adhering to the can.

The label and trading stamp may be used without the tab D, and in Fig. 4 is illustrated a label containing a trading stamp without such tab. C¹ indicates the stamp. In this case, the lines of perforation *c*¹ extend completely about the trading stamp. In order to remove the stamp it is necessary to take a knife or some sharp pointed instrument in order to detach one corner of the stamp from the label, after which it may be readily torn therefrom along the lines of perforation.

It is sometimes desirable for convenience of collecting, to paste trading stamps in a book. Since the rear face of the stamp described above can not be caused to adhere by the use of paste or glue, by reason of the waxy or greasy impression E, the printing on the face of the stamp is duplicated on the rear side of the stamp before the wax or oily impression E is placed upon it, so that said stamp, when removed from the label, may be placed in the book with its obverse face pasted to the page of the book and its reverse face exposed to view. The waxy or oily impression being transparent, the printing on the reverse side of the stamp will be visible through the impression E.

Obviously, other means than that heretofore described may be provided for preventing the rear face of the stamp from adhering to the can or other package to which the label is applied. For example, when applying the paste or gum to the label, the paste or gum may be omitted from the rear face of that part of the label which bears the stamp. Thus the part represented by E in Fig. 3 will, in this case, be a blank space which is not covered by the adhesive by which the label is to be secured in place.

While we have mentioned the use of lines of perforation as the preferred way of weakening the lines defining the stamp, it is apparent that other ways of weakening

said lines with like effect may be adopted and these are to be understood as included by the term "lines of perforation" when used in the claims.

5 We claim as our invention:—

1. In combination with a label adapted to be pasted to a can or the like, a trading stamp printed on said label, and an adhesion preventing layer larger than the stamp applied to the reverse side of the label beneath the stamp, and adapted to prevent the stamp bearing part of the label from adhering to the can or the like, said label being provided with lines of perforation adapted to permit the ready severance of the stamp from the label.

2. In combination with a label adapted to

be attached to a can or the like by means of an adhesive, a trading stamp printed on said label, the printing on said stamp being duplicated on the reverse side of the stamp, and transparent means covering the reverse side of the stamp bearing part of the label adapted to prevent that part of the label from sticking to the can or the like.

In testimony, that we claim the foregoing as our invention we affix our signatures in the presence of two witnesses, this 15th day of October A. D. 1910.

JOHN MARTIN.

HERMAN FIETSCH, JR.

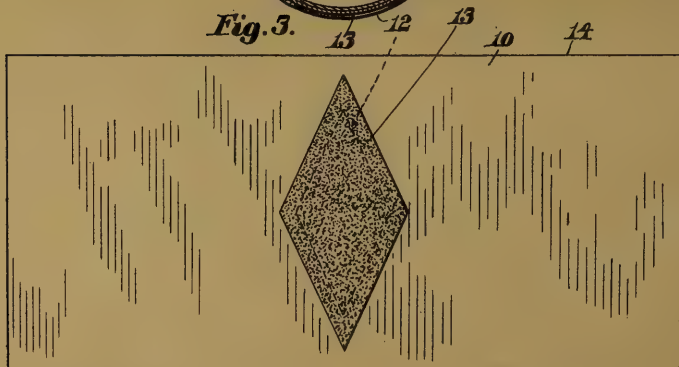
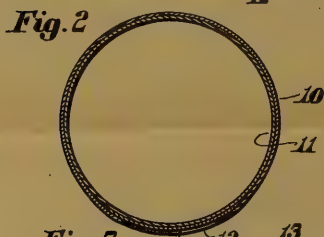
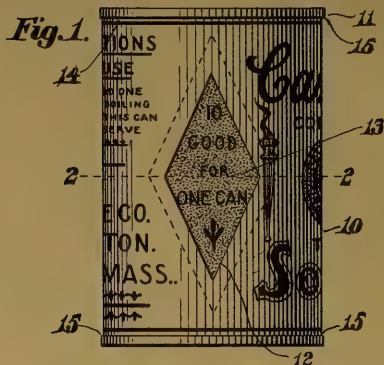
Witnesses:

CLARENCE E. MEHLHOPE,

GEORGE R. WILKINS.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

H. B. DUANE.
 COMBINED LABEL AND PREMIUM COUPON.
 APPLICATION FILED APR. 7, 1905.



Witnesses:

Nathan C. Lombard.
 Nathaniel A. Whitehead.

Inventor:

Harry B. Duane,
 by Walter E. Lombard,
 Atty.

Cole^{ms} C-3 Eg.
Hookstratten
Ref. H.
Nov. 17 6

GEO. W. FENIMORE

UNITED STATES PATENT OFFICE.

HARRY B. DUANE, OF BOSTON, MASSACHUSETTS.

COMBINED LABEL AND PREMIUM-COUPON.

No. 814,592.

Specification of Letters Patent.

Patented March 6, 1906.

Application filed April 7, 1905. Serial No. 254,402.

To all whom it may concern:

Be it known that I, HARRY B. DUANE, a citizen of the United States of America, and a resident of Boston, in the county of Suffolk and State of Massachusetts, have invented certain new and useful Improvements in a Combined Label and Premium-Coupon, of which the following is a specification.

This invention relates to combined labels and premium-coupons for packages, said labels and premium-coupons being so constructed and arranged that the latter cannot be tampered with until the packages reach the consumer.

Recently it has become a general practice among manufacturers of many goods, particularly in the food line, to issue with each package a coupon, a certain number of said coupons being redeemable for a premium. These coupons have generally been attached to the exterior of the package in such a manner that they may be easily tampered with and oftentimes never reach the consumer, or, in other words, the package purchased will be found to be minus one element of its intrinsic value—i. e., the premium-coupon. To prevent this and to insure that each purchaser of a package put up by a manufacturer giving premium-coupons shall receive the premium issued by such manufacturer is the object of the present invention; and it consists in certain novel features of construction and arrangement of parts, which will be readily understood by reference to the description of the drawings and to the claims to be hereinafter given.

Of the drawings, Figure 1 represents an elevation of a package embodying the features of this invention. Fig. 2 represents a horizontal section, and Fig. 3 represents a rear elevation, of the label for said package.

Similar characters designate like parts throughout the several figures of the drawings.

In the drawings, 10 represents an ordinary label to be applied to a can 11 or other similar package. The label 10 is provided with an opening 12 of any suitable shape and size, and to the rear face of said label is secured a premium-coupon 13 of a different color than the color of the label, so that said coupon will be conspicuous through the opening 12 in said label. The premium-coupon may be provided with any suitable lettering to dis-

tinguish its nature. The label thus prepared is applied to the can, carton, or other package in any well-known manner, the edges thereof abutting the lip 15 of the ends of the can, carton, or other package, so that access beneath said label is prevented. It is obvious that when a label is constructed in the manner described and applied to a package it would be impossible to remove the coupon without destroying a portion of the label and making the theft so apparent and conspicuous as to be noticed by the purchaser and prevent the sale of such package.

It is preferable to secure the coupon to the rear face of the label before applying; but it is evident that the same object could be readily obtained without so doing by simply holding the coupon in the proper position until the label is applied to the can, carton, or other package, when it would be prevented by contact therewith from displacement.

These coupons may be used in connection with the labels of packages of any size or shape and can be used on labels already printed, thus dispensing with the necessity of printing new special labels for this particular purpose, with the consequent loss of all of the labels in stock.

Having thus described my invention, I claim—

1. The combination with a label having an opening therein, of a premium coupon held in position by said label and exposed to view through said opening.

2. The combination with a label having an opening therein, of a premium-coupon secured to the rear of said label and exposed to view through said opening.

3. The combination of a package, a label therefor, a premium-coupon interposed between said package and label, the label being provided with means for exposing said coupon to view through said label.

4. The combination of a package, a label therefor, a premium-coupon of contrasting color interposed between said package and label, the label being provided with means for exposing said coupon to view through said label.

5. The combination with a label having an opening therein, of a premium-coupon of contrasting color secured to the rear of said label and exposed to view through said opening.

6. The combination of a package provided
with shoulders at either end, a label therefor
extending from one shoulder to the other and
provided with an opening therein, and a
5 premium-coupon interposed between said la-
bel and package and exposed to view through
said opening.

Signed by me at Boston, Massachusetts,
this 5th day of April, 1905.

HARRY B. DUANE.

Witnesses:

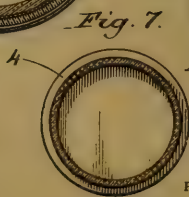
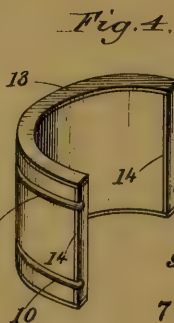
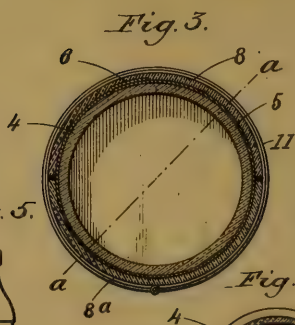
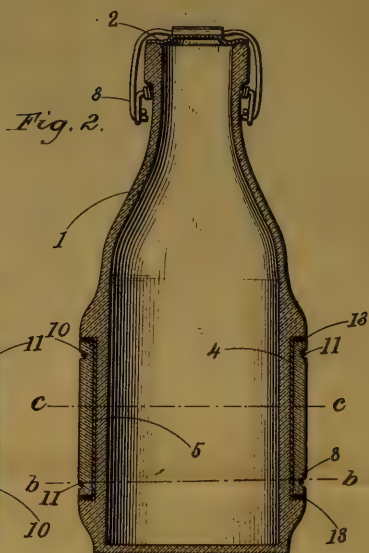
EDNA C. CLEVELAND,
WALTER E. LOMBARD

(No Model.)

S. B. HOSMER.
ADVERTISING DEVICE.

No. 566,761.

Patented Sept. 1, 1896.



Witnesses,
L. M. Spang.
Emil Neuhart.

Sumner B. Hosmer Inventor.
By James Sangster, Attorney.

Cole	}	No. C 357
Herkshatten		
Def	EXHIBIT	
	P. O. I.	
Filed	Nov. 17	6
Wm. M. VAN DYKE		
DEPUTY		

UNITED STATES PATENT OFFICE.

SUMNER B. HOSMER, OF TONAWANDA, NEW YORK.

ADVERTISING DEVICE.

SPECIFICATION forming part of Letters Patent No. 566,761, dated September 1, 1896.

Application filed January 30, 1896. Serial No. 577,335. (No model.)

To all whom it may concern:

Be it known that I, SUMNER B. HOSMER, a citizen of the United States, residing at Tonawanda, in the county of Erie and State of New York, have invented certain new and useful Improvements in Advertising Devices, of which the following is a specification.

My invention relates to a new and improved advertising device, and will be fully and clearly hereinafter described and claimed, reference being had to the accompanying drawings, in which—

Figure 1 represents a side elevation of a milk-bottle as a suitable means for illustrating my invention. Fig. 2 is a vertical central section on or about line *a a*, Fig. 2. Fig. 3 is a horizontal section on or about line *b b*, Fig. 2, cutting through the advertising-paper and transparent covering portions. Fig. 4 represents a detached perspective view of one of the covering portions. Fig. 5 represents a side elevation showing a slight modification of my improved advertising device. Fig. 6 represents a vertical central section through a milk-bottle, showing another modification of the device. Fig. 7 represents a reduced horizontal section on or about line *c c*, Fig. 2, the covering portions and advertising-paper being omitted.

My invention consists of a milk-bottle provided with removable advertisements and means for removably securing said advertisements to the bottle water-tight, so that the advertisements can be readily removed at any time without injury and others put in their place.

My invention consists also in certain details of construction, all of which will appear farther on.

Referring in detail to the several parts in said drawings, 1 represents an ordinary milk-bottle as a suitable means for illustrating my invention. It is provided with the usual cover 2 and wire fastening device 3.

Around the body of the bottle is a reduced portion forming a depression 4, in which I place a strip of paper 5, either put in, in one or more pieces, or extended around the bottle, so that the ends lap over each other, substantially as shown at 6 in Fig. 3. Under some conditions the ends at 6 may be cemented together. The paper with its advertisements

could then, when desired, be easily removed by cutting it down one side and releasing it.

When it is desired to protect the advertisements, I employ a transparent cover 7 (shown in Fig. 6) or semicircular covers 8 and 8^a, (shown in Fig. 6.) These covers are preferably made of glass. If in one piece, as shown in Fig. 6, I employ a slightly-tapering bottle 9 (but it may be substantially straight-sided, if desired) and a correspondingly-tapering covering portion 7. The advertising-paper 5, being made to fit, is passed down over the bottle first and then the glass cover 7 is put on. When two covers 8 and 8^a are used, they are made of the proper form to fit the depression in the body of the bottle and are provided with grooves 10, in which a surrounding wire 11 is placed and secured by twisting the ends substantially as shown in Fig. 1 at 12; but a lead-seal lock, or any lock of well-known construction, may be used, and, if desired, string may be used to tie the covering portions to the bottle, which may be easily cut when removal is required.

In Fig. 2 I have shown ring 13, of rubber, secured at the top and bottom of the depressed portions, so that when the covering portions are put on over the paper carrying advertisements a water-tight joint will be formed at these points, and to secure a tight joint where the edges of the covers meet (see Fig. 4) a strip of rubber or other elastic material 14 may be fastened to the edges in any well-known way by rubber or other cement, or the strips 14 may be otherwise secured between the edges of the glass.

By the means above described an advertisement or a series of advertisements may be printed upon the paper strips and secured to the bottle, and from which they can be easily removed when required and substituted by others. In lieu of the paper, a sheet of thin white rubber cloth having the advertisements printed thereon may be used, or any well-known sheet material adapted to be removably secured to the bottle and upon which advertisements can be printed or otherwise placed thereon. If desired, the glass cover 7 (shown in Fig. 6) may be omitted, and the paper 5, being secured at the edges, forms a jacket on which the advertisements are placed, and being dropped down over the bot-

the will remain in place without any fastening device. In this case the wire 16 (shown in said Fig. 6) may be omitted.

I claim as my invention—

5 1. An advertising-bottle, having a surrounding depression, in combination with a paper having an advertisement thereon, two
10 semicircular glass-covering portions provided with grooves 10, and adapted to fit in said depression over the advertising-paper, means for removably securing the covering portions
15 2. In an advertising-bottle, the combina-

tion therewith of a removable sheet of material carrying advertisements transparent removable covers having grooves near the top and bottom edges, for covering the advertisements, means consisting of wires adapted 20 to fit said grooves for removably securing the covers to the bottle, and means for securing a water-tight joint between the edges of said covers so that the same may be easily removable, substantially as described.

SUMNER B. HOSMER.

Witnesses:

JAMES SANGSTER,

L. M. SPONG.

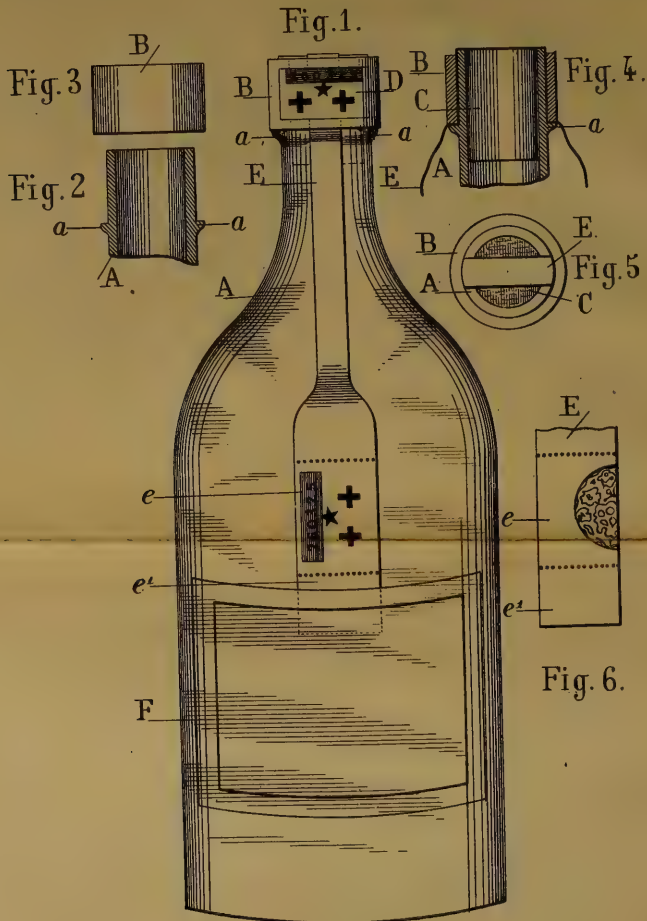
(No Model.)

A. & L. BRALY.

MEANS FOR PREVENTING FRAUDULENT REFILLING OF BOTTLES, &c.

No. 589,406.

Patented Sept. 7, 1897.



Witnesses.
Thomas M. Smith.
Richard C. Maxwell.

Inventors:
Andri Braly and Louis Braly
J. Walter Douglass
Attorney

Cole	10. C-3 kg
vs. Hookstratten	
Def. EXHIBIT	
NO. 2	
FILED Nov. 17	1906
U.S. DEPT. OF JUSTICE	
CLERK	
DEPUTY CLERK	

UNITED STATES PATENT OFFICE.

ANDRÉ BRALY AND LOUIS BRALY, OF PARIS, FRANCE.

MEANS FOR PREVENTING FRAUDULENT REFILLING OF BOTTLES, &c.

SPECIFICATION forming part of Letters Patent No. 589,408, dated September 7, 1897.

Application filed April 19, 1897. Serial No. 632,771. (No model.)

To all whom it may concern:

Be it known that we, ANDRÉ BRALY and LOUIS BRALY, citizens of France, residing at Paris, France, have invented certain new and Improved Means for Preventing the Fraudulent Refilling of Bottles and other Containers and Verifying the Genuineness of their Contents; and we do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification.

We make use of ringless bottles having a flange or shoulder a few centimeters from the top of the neck, upon which rests a transparent ring of glass or other material provided with a label inside, upon which are appropriate signs the object of which will be herein-after explained. A safety-band of paper or other material is inserted between the ring and the bottle, and one end of such band has a detachable portion which reaches down as far as the middle of the bottle and is placed under the label.

This invention is illustrated in the annexed drawings, in which—

Figure 1 shows a bottle secured in accordance with our invention. Fig. 2 is an axial section of the neck of the bottle. Fig. 3 shows the ring. Fig. 4 is an axial section showing the several parts in their respective positions. Fig. 5 is a plan of the corked bottle. Fig. 6 shows the reverse side of the safety-band.

In the figures, A is the bottle.

a is the flange or shoulder upon which the ring B rests.

C is the cork.

D is a label gummed on the inside of the ring B. This label is provided with suitable signs and characters which are seen from the outside, the ring being transparent.

E is the safety-band. e is its detachable portion or label, which bears the same signs and characters as the label D.

F is the usual bottle-label.

It may be remarked that the detachable portion or label e of the band E is provided on the reverse side with suitable signs or characters

which are not the same as those upon its face, as is shown in Fig. 6 of the drawings.

In applying our invention we proceed in the following manner: The bottle A being filled with liquid is corked in such a manner that its cork C is flush with the top of the neck. The safety-band E is placed across the cork, as shown in Fig. 4. The ring B, which has previously been provided with its label, is then placed as above described. This ring is pushed down until it rests against the shoulder a and is kept fast to the bottle by means of a suitable cement. The band E is thus pinched between the ring and the bottle and covers the cork. The free end of the band, except the detachable portion e, is then pasted upon the bottle itself. The end e' of the band E is also pasted upon the bottle, and the label F is then put on in such a manner as to almost completely cover the portion e'.

It has already been stated that label D and the detachable portion or label e are provided with the same signs and characters, as shown in Fig. 1. Consequently the consumer in buying a bottle has an easy means of assuring himself that there has been no fraud and that the label D and the band E have been applied by the same person. Moreover, there is also a second means of verification at hand. It is only necessary to detach the label e, which, as has been stated, contains on its reverse side different signs and characters from those on the face side, and to send this label to the firm purporting to have placed them on the bottle. This firm of course preserves a duplicate of each band and can therefore easily verify the label sent to them.

Of course each band should bear a different number and stamp. Thus the labels D and e bear on their front side, as in Fig. 1, the number "260,325" and a star with two crosses, and the label e bears, for example, on its reverse side a portion of an impression of a stamp, the remainder of which is preserved by the firm of origin. These combinations may of course be varied indefinitely. As will readily be understood, this arrangement may be applied to all kinds of receivers. A bottle is shown as an example.

Having now particularly described and ascertained the nature of our said invention

and in what manner the same is to be performed, we declare, without limiting ourselves to the details of execution, which may be varied, that what we claim is—

5 In a device of the character described, the combination of the container having a flange below its mouth or orifice, a transparent ring adapted to be supported on said flange, a stopper adapted to close the orifice or mouth
10 of the container, a safety-band passed over the upper face of the stopper and between the ring and the container, a distinctive label arranged on the inner periphery of the ring and between the ring and safety-strip, a duplicate

detachable label carried by the strip and af- 15
fixed to the container below the ring, said duplicate label having on its reverse side certain concealed identification marks or symbols, substantially as and for the purposes described. 20

In testimony whereof we affix our signatures in presence of two witnesses.

ANDRÉ BRALY.
LOUIS BRALY.

Witnesses:

G. DE MESTRAL,
EDWARD P. MACLEAN.



FREE!

Save Center Panel of this
Label, Entire Front
Reading:

"STAR BRAND CONDENSED MILK"

Bring labels to any PREMIUM
STORE.—Addresses of which are given
on the back of this label, or write to
address below for Premium List.

BORDEN'S PREMIUM CO., INC.
44 HUDSON STREET.
NEW YORK CITY.



STAR
BRAND
SWEETENED
CONDENSED
MILK

COPYRIGHT NET WEIGHT 14 OUNCES REG U S PAT OFF



STAR BRAND

This is pure full cream cows' milk,
condensed, and preserved with
refined sugar.

Use in Coffee, Tea or Chocolate
without diluting. For other purposes
add enough water to reduce to con-
sistency desired.

By adding one part of water to one part
of the contents of this can a resulting
milk product will be obtained which will
not be below the legal standard for whole milk.

BORDEN'S CONDENSED MILK CO.
NEW YORK, U. S. A.
EST. 1857

STAR MILK PREMIUM STORES

NEW YORK CITY

44 Hudson Street.
147 Eighth Avenue.

434 West 42nd Street.
535 Courtlandt Ave.
61 East 125th Street.

177 Avenue A.
1522 Second Ave.

BROOKLYN

2 Sumner Avenue.
236 Livingston Street.

ERSEY CITY, N. J.
350 Grove Street.

ONG ISLAND CITY
44 Jackson Avenue.

TATEN ISLAND
533 Bay St., Stapleton.

LIZABETH, N. J.
1115 Elizabeth Avenue.

ERTH AMBOY, N. J.
289 McClellan Street.

YONNE, N. J.
395 Broadway.

NEW BRUNSWICK, N. J.
8 Church Street.

ENTON, N. J.
204 So. Warren Street.

PHILADELPHIA, PA.

117 So. 11th Street.
528 W. Girard Avenue.

NEWARK, N. J.
52 Bank Street.

PATERSON, N. J.
325 Main Street.

PASSAIC, N. J.
81 State Street.

HOBOKEN, N. J.
66 Sixth Street.

ALBANY, N. Y.
107 Beaver Street.

BUFFALO, N. Y.
619 Main Street.

CHARLESTON, S. C.
393 King Street.

BALTIMORE, MD.
535 N. Howard Street.

This label is copyrighted and all rights as to its transfer, exchange, or any other use to which it may be put, are reserved.

Redeemable only by the person to whom originally issued

BORDEN'S PREMIUM CO., INC.

14 HUDSON STREET,

NEW YORK CITY.

Indefinite
Colo
na
Def EXHIBIT
NO. K
Filed Nov. 17 1916
WM. M. VAN DYKE, Clerk
DEPUTY CLERK

SAVE THE PREMIUM COUPON ON THIS WRAPPER.

IMPORTANT. Do not exchange our Premium Coupons for trading stamps or sell them to coupon brokers for they give you only a very small return for them. We want YOU to have the full benefit. For your protection, we refuse to redeem or return any coupons received from these agents or dealers. The coupon on this wrapper is subject to the rules and conditions contained in our premium catalogues in force at the time this coupon is returned for redemption.

The list below represents only a few of our assortment of over 800 premiums, contained in our illustrated catalogue.

FOR 15 COUPONS

- No.100 Child's Picture Book
- " 157 Six Aluminum Hair Pins
- " 173 Twelve Wax Crayons
- " 182 Tape Measure, 60 in.
- " 198 Set Paper Dressing Dolls

FOR 25 COUPONS

- No.200 Box of Colored Crayons
- " 203 Child's Picture Book
- " 204 Three Gold Plated Beauty Pins
- " 213 Child's Gold Filled Ring
- " 229 Box of 12 Water Colors
- " 231 Tube of Cold Cream
- " 233 Crescent Scarf Pin
- " 266 Two San-knit-ary Wash Cloths

FOR 35 COUPONS

- No.301 Picture Book
- " 306 Lady's Linen Handkerchief
- " 307 Stag Handle Kitchen Knife
- " 308 Lady's Leather Purse

FOR 35 COUPONS

- No.361 Miniature Powder Puff, German Silver
- " 369 Rubber Rattle and Teething Ring
- " 370 Pair Side Combs
- " 371 Back Comb

FOR 50 COUPONS

- No.500 Lace Bureau Scarf, 17x52 in.
- " 527 Child's Ring, Imitation Turquoise
- " 531 Child's Adjustable Bracelet
- " 539 Razor Strop
- " 542 Gold Filled Wedding Ring
- " 546 Gold Filled Circle Brooch
- " 547 Butter Knife, Sil. Pl.
- " 548 "Rubber-set" Toothbrush
- " 549 "Rubber-set" Shaving Brush
- " 564 Pair of Silver Waist Pins

FOR 60 COUPONS

- No.604 Lady's 3 stone Ring
- " 605 Boy's Tiger Eye Ring
- " 606 Boy's Wood Pipe
- " 607 Lady's Pocket Book



FOR 60 COUPONS

- No.610 Pocket Knife, 2 blades
- " 618 Embroidered Doily, 18 in.
- " 619 Pack Playing Cards
- " 623 Nutpicks and Crack

FOR 100 COUPONS

- No.1032 Leather Cigar Case



PREMIUM NUMBER 1034

- No.1034 Infelder's Baseball Glove
- " 1039 "Economical" Cook Book
- " 1083 Fountain Pen
- " 1092 Simplex "Giant" Typewriter

FOR 125 COUPONS

- No.1218 Ostrich Feather
- " 1220 Gold Filled Locket

FOR 150 COUPONS



PREMIUM NUMBER 1528

- No.1528 1/2 dozen Silver Plated Tea Spoons
- " 1531 1/4 dozen Silver Plated Table Spoons
- " 1541 1/2 dozen Silver Plated After Dinner Coffee Spoons
- " 1553 Dressmaker's Shears

FOR POTS, PANS, SINKS, GLASSWARE, CROCKERY, METAL, ETC.

A perfect Scouring Cleanser with just enough grit to catch the dirt. Does not Scatter and Waste.



CONSUMERS' PREMIUM COUPON.

NOT TRANSFERABLE. REDEEMABLE BY ORIGINAL CONSUMER ONLY.

DIRECTIONS. Cut out the big word OCTAGON on the other side. Do not send the whole wrapper. Describe the premium you want and give its number. Send your OCTAGONS and letter in the same package. Do not write on small scraps of paper. Send your full name, street, number and post-office address to COLGATE & CO., 30 York St., Jersey City, N. J.

When sending coupons to us be sure to put the correct amount of postage stamps on your envelope and address it plainly. We will send you the premiums ALL DELIVERY CHARGES FULLY PREPAID.

FOR 50 COUPONS



PREMIUM NUMBER 571

- No.571 Lady's Signet Ring
- " 577 Lady's Ring set with Imitation Pearl or Turquoise
- " 578 Child's Ring set with Imitation Ruby and Diamond
- " 583 Lady's Chased Ring
- " 585 Pearl Brooch
- " 588 Pair of Men's "Paris" Garters

FOR 60 COUPONS

- No.600 Gentleman's Suspenders

FOR 60 COUPONS



PREMIUM NUMBER 629

- No.629 School Companion Set in Felt Case
- " 651 School Companion Set in Polished Wood Box

FOR 75 COUPONS

- No.701 Boy's Professional Baseball
- " 722 Lady's 5 Stone Ring
- " 725 Baby's Nethersole Bracelet
- " 731 Solid Gold Baby Ring
- " 733 Pocket Scissors (To size 3 only)
- " 770 Lady's Change Purse
- " 779 White Lawn Apron

Write to us enclosing one wrapper for a copy of our current illustrated premium catalogue, which contains a list of more than 800 premiums to choose from—things that you want—merchandise that is good and useful, and just what you would go to the store and spend your money for.

THIS LIST EXPIRES DECEMBER 31ST, 1917.
WRITE FOR NEW CATALOGUE AFTER THAT DATE.



PREMIUM NUMBER 310

- No.310 Child's Gold Filled Signet Ring, engraved with one initial
- " 317 "Keepclean" Toothbrush

- " 334 Paper Dressing Doll Set
- " 339 Sterling Silver Signet Ring
- " 351 Pair "Baby" Pins

FOR LAUNDRY WORK, DISH WASHING, SCRUBBING, ETC.

Dissolves in Hot or Cold Water
Makes a Quick Lather
Softens Hard Water

Concentrated—Economical



USE OCTAGON SOAP, POWDER AND CLEANSER. ALL HAVE PREMIUM COUPONS

COLGATE & CO.

SPECIAL NOTICE The Octagon Soap is on account of its good quality and popularity has been more extensively limited than any other soap. In order that you may not be deceived by these inferior soaps, we have adopted as an additional trade-mark stripes or bands on our wrappers. Only the genuine Octagon cake has stripes or bands on its wrapper. Do not be deceived, insist on having our name and trade-mark on each wrapper.

before using. It will last longer and give better satisfaction.

Octagon Soap improves with age. Unwrap and put aside to dry thoroughly

Write your full name and complete address on the blank opposite, and mail this wrapper to COLGATE & CO., 30 York St., Jersey City, N. J. for a beautiful 64 page catalogue containing a complete list and numerous illustrations of over 800 premiums.

COLGATE & CO. N.Y.

A GOOD SOAP

CUT OUT THIS PREMIUM COUPON. SEE OTHER SIDE

OCTAGON

REGISTERED U.S. PATENT OFFICE

VOID IF PAID, RESTRICTED OR FORBIDDEN BY LAW IN YOUR STATE

FOR ALL USES

COLGATE & CO. N.Y.

Name	City	State
Street		

The Octagon Soap is an original idea in Soap Making, differing in many important particulars from all other Laundry Soaps.

- 1st.—It is the first eight sided cake ever made.
- 2nd.—It will, owing to its peculiar shape, lather more quickly than the ordinary shaped cakes, as it has eight sides exposed to the water instead of four.
- 3rd.—It just fits the hand, and thus permits you to hold it firmly when wet and wringer.
- 4th.—It will dry harder and better and thus improve more rapidly with age than any other shaped cake, as the air can more freely circulate around it.
- 5th.—It will wash as well in hard as in soft water, which is a conspicuous and exceptional merit, as most soaps will wash well only in soft water.
- 6th.—By cutting the cake through the middle ring you will have two pieces which will just fit the hand, each one of which will do as much washing as an adulterated 12 oz. cake.
- 7th.—By cutting the cake through each of the three rings that encircle it, four pieces of perfumed soap, of convenient size and shape for hand washing or ordinary toilet use are obtained.
- 8th.—The Soap is so free from excess of alkali, that it will not chafe or redden the hands nor injure the most delicate skin.
- 9th.—The Octagon Soap can be used equally well in hot or in cold water; for boiling the clothes or cleaning them in washing machines; in making a good soft soap, or in any way you may desire.
- 10th.—The Octagon Soap will always give satisfaction, for it preserves the clothes instead of injuring them as do the Labor Saving Soaps and strong washing powders which in order to wash quickly are filled with strong chemicals that eat into and destroy the articles washed.

Special Notice

HOW TO WASH CLOTHES IN HOT WATER.

Soak the clothes in cold water (all night if possible.) Wring them and plunge them into boiling hot water in which Kirkman's Borax Soap has been melted. After washing, RINSE THOROUGHLY IN CLEAN WATER and hang out to dry. Quick and good work. The clothes bleached and purified. *And please remember Kirkman's Borax Soap does not hurt the hands.*

BLANKETS AND WOOLEN GOODS should be soaked in cold, soapy water, AND THEN RINSED THOROUGHLY IN CLEAN WATER. Most laundresses are opposed to boiling woolen clothing. The very best results are obtained by the use of KIRKMAN'S BORAX SOAP AND COLD WATER.

WHY DO THE PEOPLE LIKE IT SO MUCH?

They like Kirkman's Borax Soap because it is the best. Best in every way. It will wash clothes in either hot or cold water and it washes well and quickly, bleaching, purifying and sweetening and please remember it does not injure the skin.

SAVE KIRKMAN'S SOAP DOWNED COUPONS
CUT OUT THIS COUPON. ESTABLISHED 1937
KIRKMAN & SON.
 PLEASE KEEP THIS COUPON SMOOTH AND CLEAN.
 THE COUPONS IN PACKAGES OF 25 EACH.
BROOKLYN, N.Y. KIRKMAN & SON.

Clothes must be rinsed thoroughly whether washed with Soap or Soap Powder. Rinsing is just as important as washing. No matter how carefully clothes are washed, if not thoroughly rinsed, the result will be unsatisfactory.



KIRKMAN'S SOAP
 FOR WASHING CLOTHES
 IN EITHER COLD OR HOT WATER.

KIRKMAN'S BORAX SOAP

KIRKMAN'S SOAP
 FOR WASHING CLOTHES
 IN EITHER COLD OR HOT WATER.



KIRKMAN'S BORAX SOAP

HOW TO WASH CLOTHES IN COLD WATER.
 First wet the clothes. Then rub on some Kirkman's Borax Soap. Then let the clothes soak a while. After washing them RINSE THOROUGHLY IN CLEAN WATER and hang out to dry. Kirkman's Borax Soap sweetens, purifies and bleaches. *It never hurts the hands.*

TO GET THE BEST RESULTS,
 Kirkman's Borax Soap should be cut into small pieces, say four pieces to each cake, and thoroughly dried. It is made of pure materials only, and is combined with skill by most careful and reliable soap makers. *Keep this always in mind—it will not hurt the skin.*

FOR WASHING THE HAIR there is nothing better than
 Kirkman's Borax Soap. But be sure and use pure water (rain water is the best.) Make a stiff lather in the hair, then WASH OUT THOROUGHLY.

ARE YOU SAVING ALL OF KIRKMAN'S COUPONS AND THEREBY GETTING THE FULL BENEFIT OF THE KIRKMAN PREMIUM PLAN?



*Col. W. L. Moore
Hickok Station
P.O. Box 17
Nov. 17, 1906.
Geo. W. Fellmore*

THERE IS A COUPON ON EACH PACKAGE.

PREMIUM CATALOGUES

Our STORE CATALOGUE shows premiums which are given to customers who bring coupons to one of our Stores and carry home the premiums.

These Catalogues are free. Send for one to-day. When writing (a post) will do) please state which Catalogue you desire.

KIRKMAN & SON
BROOKLYN, N. Y.

188

PREMIUM STORES

- BROOKLYN**
303 BRIDGE ST.
21 SUMNER AVE.
405-5 12 AVE.
120 GREENPOINT AV.
110 BELMONT AV.
- NEW YORK**
450 GRAND ST.
181 AVE. A
381 BLEECKER ST.
137 WEST 53RD ST.
450 WEST 42ND ST.
1480 - 1 & 12 AVE.
6035 - 3 & 12 AVE.
619 COURTLANDT AVE.
- JERSEY CITY**
501 SUMMIT AVE.
- NEWARK**
319 WASHINGTON ST.
- PATERSON**
103 MARKET ST.
- BRIDGEPORT**
237 MIDDLE ST.
- NEW HAVEN**
117 COURT ST.
- HARTFORD**
15 PARK ST.
- PROVIDENCE**
392 WEYBOSSETT ST.
- SPRINGFIELD**
48 E. COURT ST.
- BOSTON**
791 WASHINGTON ST.
- ALBANY**
23 HOWARD ST.
- BUFFALO**
101 DEARLS STREET
- PHILADELPHIA**
2125 NORTH FRONT ST.
1119 SOUTH ST.
24 NORTH 10TH ST.
- BALTIMORE**
216 W. FRANKLIN ST.
- WASHINGTON DC**
525 PENNSYLVANIA AVE. N.
- RICHMOND**
105 NORTH 6 12 ST.
- NORFOLK**
114 COLLEGE PL.
- RICHMOND**
135 CLINTON AVE. SOUTH
- SYRACUSE**
424 S. CLINTON ST.
- UTICA**
6 DEVEREUX ST.

CUT OUT
THE
COUPON

CUT OUT
THE
COUPON

Handsome Presents Given in Exchange for Trade Marks.

Do not dispose of your Babbitt Trade Marks to any other concern. You obtain full value only when you receive our presents for them.

To Secure Presents Quickly Save Trade Marks from

BABBITT'S

Best Soap Naptha Soap White Floating Soap
1776 Soap Powder Cleanser Spic & Span Metal Polish
Spic & Span Silver Polish

Our Premiums and redemption offer are for consumers only. This coupon trade-mark will be redeemed only when presented by the consumer who purchased the original filled package bearing this coupon trade-mark, but will not be redeemed if this coupon trade-mark or redemption offer, or the sale of this package there-with, is taxed, restricted or forbidden by law.

FOR TRADE MARK CUT ALONG DOTTED LINES.

Babbitt's Cleanser Costs Only 5c

Your grocer will gladly help you reduce the cost of cleaning. He sells the large can of Babbitt's Cleanser at 5c. The full size can is for sale at all first class grocers. It is the equal in quality to any Cleanser sold at any price and the quantity is greater than other Cleansers, sold at double the price.



It is to your interest both as a matter of economy and cleanliness to try this Cleanser and keep it permanently in your Kitchen and Bathroom. Thousands of new users are being added continually.

5c

Why Pay More?

NONE BETTER—LARGER QUANTITY—PRICE ONLY 5c

B.T. Babbitt Products listed above have valuable Trade Marks good for premiums. We advertise by sharing the profits of this old established business with you.

Mail Order Department
B. T. Babbitt,
New York City
Prepay full postage on Trade Marks.
Send for list of Mailable Presents.

WASHING MADE EASY!

SEE REVERSE SIDE

Def
2
Nov. 17
Geo. W. Hunt
B. T. Babbitt's
→ TRADE MARK ←
BEST SOAP.

SEE REVERSE SIDE

IMPORTANT: Babbitt's Best Soap now contains as much Borax as any standard borax soap on the market. Note the mild effect on the hands and softening power in hard water. It gives excellent results in cold water.

THE STANDARD LAUNDRY SOAP OF AMERICA FOR OVER SIXTY YEARS

IT IS PACKED IN BOXES, EACH BOX CONTAINING 100 PRESSED AND WRAPPED CAKES.

B. T. BABBITT'S STORES:

NEW YORK CITY:

32 & 34 West 18th Street,
238 East 59th Street,
1 West 125th Street,
397 East 148th Street.

BROOKLYN, N. Y.

961 Broadway,
1142 Myrtle Avenue,
354 Livingston Street,
145 Belmont Avenue.

JAMAICA, L. I. 23 S. Washington Street.
JERSEY CITY, N. J. 265 Central Ave.
NEWARK, N. J. 264 Washington Street.
PATERSON, N. J. 344 Grand Street.
ALBANY, N. Y. 90 Maiden Lane.
SCRANTON, PA. 613 Spruce Street.
ROCHESTER, N. Y. 38 St. Paul Street.
SAN FRANCISCO, CAL. 24 California St.

CHICAGO, ILL. 229 N. State Street.

PHILADELPHIA, PA.

New Store, 14 South Tenth Street.
BALTIMORE, MD. 403 N. Howard St.
ST. LOUIS, MO. 1304 Olive Street.
MILWAUKEE, WIS. 213 State Street.
LANCASTER, PA., 243 W. King Street.
BOSTON, MASS. 838 Washington Street.
NEW HAVEN, CONN. 18 Pitkin Street.
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IMPORTANT:

In order that our customers may be able to obtain premiums more quickly, we have arranged to accept the labels of Lion Brand Condensed and Evaporated Milk on the same basis as Babbitt's Trade Marks. All Babbitt Trade Marks will also be accepted at the Lion Brand Stores at the same value as Lion Brand Labels.

All Mail Orders should be addressed to B. T. BABBITT, NEW YORK, N. Y.
SEND FOR ILLUSTRATED PREMIUM CATALOG.

STAR

CUT OUT BLACK CENTER PANEL. No other part of wrapper good for premiums

STAR SOAP

REG. U. S. PAT. OFF.

STAR

PRESENTS FOR STAR SOAP USERS.

We take pleasure in notifying all Star Soap users that we offer a splendid general assortment of premiums. See other side for partial list. Cut out and send us the proper number of the Center Panels of Star Soap Wrappers (the part reading STAR SOAP in white letters on black). No other part of the Wrapper is good for premiums.

Send your letter and panels in the same envelope. Write plainly the street number or post office box, town, county and state.

THE PROCTER & GAMBLE CO.

BOX 879, CINCINNATI, OHIO.

Complete Catalogue of Premiums mailed on request.

STAR, as a brand for Soap, was original with us, and we have used it a great many years. Others are warned against infringing on our rights. This soap will recommend itself. Dealers are authorized to take it back at our expense, in case it does not give perfect satisfaction.

It does not pay, for the small difference in price, to buy inferior Soap. "The best is always the cheapest" and we guarantee "STAR" one of the best articles for family use ever put on the market. TRY IT! Compare with other Soaps, for quality and price, and we will be satisfied with your decision.

Order your premium by number and by name, and be sure to state your full name and address in the letter.

This ware is plated with pure silver on a hard "White Metal" base, and is guaranteed to wear for years. The design is an artistic Rose Pattern in a beautiful Satin French Gray Finish, unsurpassed for elegance and refinement.

	Panels
M 322—Sugar Spoon.....	35
M 323—Butter Knife.....	35
M 329—Orange Spoon.....	35
M 330—Oyster Fork.....	35
M 331—Baby Spoon.....	35
M 521—Pickle Fork. Grapo Design.....	50
M 528—Desert Spoon.....	50
M 529—Table Spoon.....	50
M 533—Dinner Fork.....	50
M 534—Soup Spoon.....	50

M 690—Three Teaspoons.....	60
M 691—Table Knife.....	60
M 862—Cold Meat Fork.....	100
M 863—Gravy Ladle.....	100
M 864—Berry Spoon.....	100
M 865—Cream Ladle.....	100
M 930—Three Tablespoons.....	125
M 931—Three Dinner Forks.....	125
M 932—Six After Dinner Coffee Spoons, In lined box.....	125
M 933—Child's Three Piece Set.....	125
M 1104—Three Table Knives.....	175
M 1313—Set of Six Individual Butter Spreaders, In lined box.....	300
M 1314—Set of Six Individual Salad Forks, In lined box.....	300
M 1359—Soup Ladle, Large size.....	350

Our Premiums are offered to consumers only. The Panels will be redeemed only when presented by the persons who have used the soap with which the Panels were issued.



Save This Wrapper

Wm. H. Van Dyke, Clerk
GEO. W. FENIMORE

DERBY
SOAP

PROCTER & GAMBLE
CINCINNATI

SAVE THIS WRAPPER. (See Other Side.)

PROCTER & GAMBLE

P. O. BOX 879.

CINCINNATI, O.

For 10 Derby "D's."

- No. 10-Painting Book for Children.
- No. 11-Six Colored Embossed Post Cards.
- No. 12-60-inch Handsewed Tape Measure.
- No. 13-Collar and Cuff Button Set.
- No. 14-Roper Doll. Two dresses and hats.
- No. 15-Cloth Girl Doll. To be sewed.
- No. 16-One Dozen Safety Pins.
- No. 17-One Child's Book in colors. Choice of 12.

For 15 Derby "D's."

- No. 75-One Dozen Kid Covered Hair Curlers. 6 inches long.
- No. 76-Pin Cube. 160 Pins.
- No. 77-One Child's Book. Choice of 5
- No. 78-One Dozen Pearl Buttons.
- No. 79-Lady's Bow Collar.
- No. 82-Four Yards of Feather Stitch Ureid.
- No. 83-One Game. Choice of 6.
- No. 84-Hair Pin Cabinet. 80 Assorted Pins.
- No. 95-Steel Crochet Hook.
- No. 96-One Child's Book. Choice of 15.
- No. 97-Child's Tooth Brush.

For 25 Derby "D's."

- No. 100-One Child's Book. Choice of 6.
- No. 101-Leather Coin Purse.
- No. 102-Mount Melick Fringed Table Mat.
- No. 103-Lady's Band Garter.
- No. 104-Alumina Tea Strainer.
- No. 105-Child's Horse Supporters.
- No. 106-Double Decker Schooler's Companion.
- No. 107-Unbreakable First Comb.
- No. 109-Harmonica.
- No. 109-Ten Inch Hair Roll.
- No. 110-Cuff and Collar Button Set
- No. 111-Six Dollies, 9 x 9.
- No. 112-Gold-plated Stick Pin.
- No. 113-Linen Lawn Splasher, 16 x 26.
- No. 114-Gold-plated Horse-shoe Breast Pin.
- No. 115-Gentleman's Linen Handkerchief.
- No. 116-Lady's Linen Handkerchief, lace edge.
- No. 117-Cloth Brush.
- No. 118-Pair Side Comb.
- No. 119-Back Comb.
- No. 120-Lady's Embroidered Collar.
- No. 121-Pair Dress Pins.
- No. 122-Lady's White Embroidered Belt.
- No. 123-Four Dollies, 10 x 10.
- No. 124-Paints, Twelve Colors.
- No. 125-Lady's White Linen Handkerchief.
- No. 126-One Game. Choice of 9.
- No. 127-One Child's Book. Choice of 3.
- No. 128-Paper Doll. Three dresses. 11 inches.
- No. 129-Cloth Doll. "Dolly Dimple."
- No. 130-One Game. Choice of 5.
- No. 131-Linen Lawn Splasher, 16 x 26.
- No. 132-One Game. Choice of 7.
- No. 323-Printing Outfit.

For 35 Derby "D's."

- No. 136-Pair Boy's Suspenders.
- No. 137-Four Dollies, 10 x 10.
- No. 138-Doll of No. 2 Satin Ribbon.
- No. 139-Tray Cloth. Duck, 17 x 26.
- No. 140-Man's Garters.
- No. 141-Centerpieces, 24 x 24.
- No. 142-Lady's Wreath Hair Brush.
- No. 143-Duck Splasher, 17 x 36.
- No. 144-Lady's Hose Supporters.
- No. 145-Centerpieces and four Dollies.
- No. 146-Pack of Playing Cards.
- No. 147-Hair Roll, 22 inches.
- No. 148-Laundry Bag, Duck, 18 x 36.
- No. 149-Book or Shawl Strap.
- No. 150-Six Dollies, 8 x 8.
- No. 151-Gold-plated Hat Pin.
- No. 152-Baby's Gold-filled Band Ring.
- No. 153-Table Cover, 20 x 20.
- No. 154-Baby's Gold-filled Ring.
- No. 155-Silver-plated Sugar Spoon.
- No. 321-Sterling Silver Seat Pin.
- No. 345-One Linen Book. Choice of 7.

For 50 Derby "D's."

- No. 175-Lady's Pocket Book.
- No. 176-Bureau Seat, 16 x 44.
- No. 177-Silk Necktie.
- No. 178-Bureau Seat, Embroidered.
- No. 179-Lady's Tooth Brush.
- No. 180-Tiny Cloth, Herringbone Lace Insertion.
- No. 182-Two Blade Jack Knife. Wood Handle.
- No. 184-Two Embroidered Turnover Collars.

For 50 Derby "D's."—Continued.

- No. 185-Checked Gingham Apron.
- No. 186-Steel Scissors.
- No. 187-Two Pairing Knives and Can Opener.
- No. 188-Sant Pin, Gold-plated.
- No. 189-Embroidery Scissors.
- No. 190-Silver-plated Butter Knife.
- No. 191-Pair Gold-plated Dress Pins.
- No. 192-Silver-plated Pickle Fork.
- No. 194-Paper Doll, 17 in. Five sets clothing.
- No. 195-Cloth Doll, life size. To be sewed.
- No. 196-Four Baby Pins. Gold-plated.
- No. 197-Gold-plated Brooch.
- No. 198-Lady's Gold-filled Signet Ring.
- No. 199-Child's Gold-filled Ring.
- No. 200-Gold-filled Band Ring.
- No. 201-Small Worested Shawl. 36 inch.
- No. 202-White Lawn Apron.
- No. 203-Linen Towel, 18 x 34.
- No. 204-Two Linen Towels, 14 x 24.
- No. 293-Rubber Stamp. For large printing.
- No. 293-Bitterwood Pipe.
- No. 302-Sterling Silver Hat Pin.
- No. 303-Sterling Silver Brooch Pin.
- No. 205-Box of Writing Paper.
- No. 206-Table Cover, Duck. Embroidered.
- No. 207-Cloth-covered Boy's or Girl's Book. Choice of 39.
- No. 208-Pillow Top Duck. Embroidered.
- No. 209-Lady's Gold-filled Ring.
- No. 210-Man's Suspenders. In fancy box.
- No. 211-12 Yards Valenciennes Edging.
- No. 212-12 Yards of Valenciennes Insertion.
- No. 213-Gold-filled Wedding Ring.
- No. 214-Sewing Box.
- No. 215-Lady's Gauge Fan. Hand-painted.
- No. 217-Gentleman's Gold-filled Ring.

For 75 Derby "D's."

- No. 218-Lady's Pearl Handle Knife.
- No. 220-Pair Button-hole Scissors.
- No. 221-Lady's Director's Collar.
- No. 222-Lightning Bread Knife.
- No. 223-Small Silver-plated Gray Ladle.
- No. 224-Nail Scissors 3 1/2 inches.
- No. 225-One Cloth bound Book. Choice of 15.
- No. 227-Best Standard Pants.
- No. 228-Silver Ring.
- No. 229-Silver Vanity Bag with Chain.
- No. 230-Gold-filled Bar Pin.
- No. 231-Lady's Gold-filled Ring.
- No. 232-Trooch Pin.
- No. 233-Lady's Sterling Silver Signet Ring.
- No. 234-Lady's Gold-filled Ring.
- No. 235-Dominoes. With spots up to double 9.
- No. 236-Cuff Buttons.
- No. 237-Scent Fan. Gold-filled.
- No. 301-White Lawn Embroidered Table Cover.
- No. 304-Ster. Silver Baby's Necktie or Ueeler.
- No. 305-Sterling Silver Brooch Pin.
- No. 307-Sterling Silver Cuff Buttons.
- No. 309-Gold-plated Ear Ring.
- No. 309-Gold-plated Ear Ring. Pearl front.



For 100 Derby "D's."

- No. 233-Motto Pillow Sham—"Good Morn-ing and Good Night."
- No. 236-Lady's Hair Brush.
- No. 239-Carving Set.
- No. 240-Pounlain Pen.
- No. 241-Twelve yards Tarchon Lace Edging.
- No. 242-Twelve yards Torchon Lace Insertion.
- No. 243-Check Gingham Apron, with bib.
- No. 244-Bread Knife, Butcher Knife and Pater.
- No. 245-Gentleman's Gold-filled Signet Ring.
- No. 247-Late Door Panel. Etern, 40 x 36.

For 100 Derby "D's."—Continued.

- No. 248-Man's Pen Knife.
- No. 249-Two Linen Glass Towels, 18 x 36.
- No. 250-Steel Shears, 7 1/2 inches.
- No. 252-Silver-plated Gray Ladle.
- No. 253-Man's Gold-plated Signet Ring.
- No. 254-Lady's Gold-filled Ring. Real Garnet.
- No. 255-Silver-plated Cold Meat Fork.
- No. 256-Child's or Miss's Sterling Silver Ring.
- No. 257-Silver-plated Berry Spoon.
- No. 291-Boy's Leather Catcher's Mitt.
- No. 294-Gentleman's Bill Fold.
- No. 295-Lady's Finger Bag.
- No. 296-Dressed Doll, 12 inches.
- No. 314-Undressed Doll, 13 inches.
- No. 310-Sterling Silver Shirt-waist Set.
- No. 311-Lady's Sterling Necktie Broochet.
- No. 312-Leather Watch Fob. Safety Catch.
- No. 258-Lady's Hand Bag, 13 inches.
- No. 259-Black Satene Skirt, 5 inch ruffle.
- No. 261-Three Silver-plated Tablespoons.
- No. 262-1/2 doz. Silver-plated Teaspoons.
- No. 263-Three Silver-plated Dinner Forks.
- No. 278-Boy's Gold-filled Vest Chain.
- No. 279-Child's Gold-filled Chain Bracelet.
- No. 292-Hair Brush and Comb.
- No. 314-Gold-plated Ear Ring.
- No. 315-Bar Rings, solid Gold Front.

For 125 Derby "D's."

- No. 265-1/2 doz. Linen Napkins.
- No. 266-Pair of Muslin Curtains.
- No. 281-Game of Parchess.
- No. 268-Tine Embroidered Lawn Waist Part'n.
- No. 269-Damask Table Cloth. White Cotton.
- No. 267-Lady's Gold-filled Neck Chain.
- No. 289-Child's Gold-plated Neck Chain, with Pendant.
- No. 300-Sterling Silver Pen Holder.
- No. 317-Child's acetate silver Chain Bracelet.
- No. 316-Man's Gold-filled Watch Chain.
- No. 318-Bar Rings. Real Coral, Gold filled.

For 150 Derby "D's."

- No. 270-Couch Cover, 40 x 100 in.
- No. 271-Razor, Fine Quality.
- No. 280-Lady's Gold-filled Necktie or Ueeler.
- No. 281-Lady's Gold-filled Watch Chain.
- No. 282-Miss's G. P. Chain. Sapphire Pendant.
- No. 283-Man's Double Sided, Gold-filled Watch Chain.
- No. 298-Safety Razor. 7 blades and handle.
- No. 322-Silver-plated Child's Set. Knife, Fork, Spoon and Napkin Ring.

For 200 Derby "D's."

- No. 274-Turkey Red Table Cloth. Fringed.
- No. 275-Six Silver-plated Table Knives. For 400 Derby "D's."
- No. 276-Fair Nottingham Lace Curtains, 3 yds. x 40 inches. For 225 Derby "D's."
- No. 277-One dozen Linen Table Napkins, 20 x 20. For 250 Derby "D's."
- No. 285-Lady's Fur Collar, in black or brown, latest shape. For 250 Derby "D's."
- No. 286-Lady's Fur Muff, in black or brown, the new flat square shape. For 300 Derby "D's."
- No. 319-Imitation Tortoise Shell Back Comb. Set with Rubastones in silver. For 275 Derby "D's."

Miscellaneous.

- No. 273-Durable Damask Linen Table Cloth, 62 x 63. For 400 Derby "D's."
- No. 274-Turkey Red Table Cloth. Fringed.
- No. 275-Six Silver-plated Table Knives. For 400 Derby "D's."
- No. 276-Fair Nottingham Lace Curtains, 3 yds. x 40 inches. For 225 Derby "D's."
- No. 277-One dozen Linen Table Napkins, 20 x 20. For 250 Derby "D's."
- No. 285-Lady's Fur Collar, in black or brown, latest shape. For 250 Derby "D's."
- No. 286-Lady's Fur Muff, in black or brown, the new flat square shape. For 300 Derby "D's."
- No. 319-Imitation Tortoise Shell Back Comb. Set with Rubastones in silver. For 275 Derby "D's."

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- No. 402-Farm and Fireside.....40
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- No. 406-Tine Housekeeper.....100
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Order by number and give description. Do not send more or less than the number of "D's" required. Give name in full; street, number and post office address. Send to

PROCTER & GAMBLE, Box 879, Cincinnati, O.

Complete Catalogue of Premiums mailed on request.

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C. C. & Co.
1916
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BY *Geo. W. Proctor*

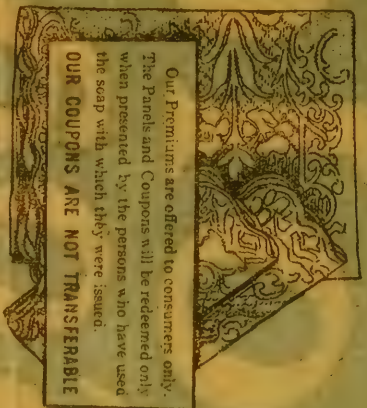
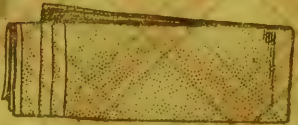
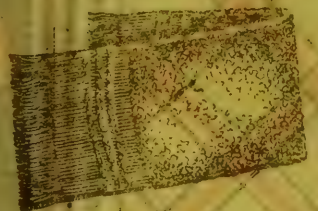
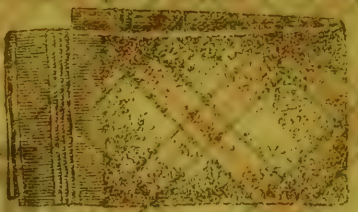
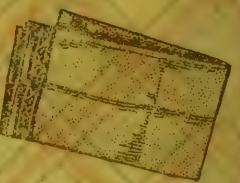
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GOLD SOAP

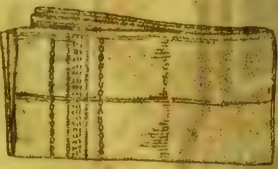
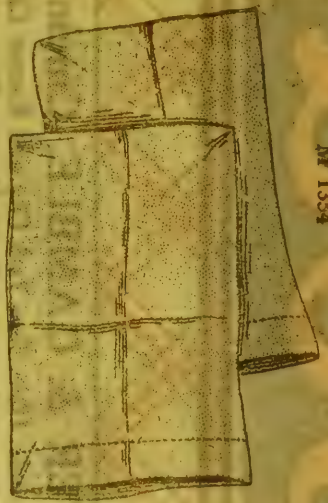


PROCTER & GAMBLE, Cincinnati

Factories at Ivorydale, Ohio, New York City and Kansas City, Kansas.
All Operated on the Profit-Sharing Plan.



Our Premiums are offered to consumers only. The Panels and Coupons will be redeemed only when presented by the persons who have used the soap with which they were issued.



*Panels or
Coupons*

*Panel's or
Coupers*

- | | | |
|---------|---|----|
| M 270-* | Cotton Huck Towel. Size 17 x 36. | 25 |
| M 271-* | One Yard Bleached Cotton Huck Toweling.
17 inches wide. | 25 |
| M 272-* | Fringed Turkish Towel. Size 17 x 34. | 25 |
| M 273-* | Two Terry Wash Cloths. 12 inches square. | 25 |
| M 318-* | Fine Linen Huck Towel. Small size, 14 x 19. | 35 |
| M 319-* | One Yard of Linen Crash Toweling. 17
inches wide. | 35 |
| M 577-* | Bleached Turkish Towel. Hemmed, 18 x 40
inches. | 59 |
| M 578-* | Hemmed Linen Huck Towel with Border.
18 x 34 inches. | 50 |
| M 579-* | Hemmed Linen Glass Towel. 18 x 36 inches. | 50 |
| M 750-* | Extra Quality Bleached Turkish Towel.
Size 22 x 4½ inches. | 75 |

Only articles marked * can be sent by mail.

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| M 751-* | Hemstitched Linen Damask Towel. | Size
19 x 36 inches. | 75 |
| M 843-* | Pair Bleached Cotton Pillow Cases. | Hem-
stitched, 42 x 36 inches. | 100 |
| M 1212-* | Bleached Cotton Sheet without Seam. | Hemmed ends. Full size 81 x 90 inches. | 200 |
| M 1273-* | Hemmed Crocheted Bed Spread. | 68 x 82
inches. | 250 |
| M 1354-* | Nottingham Lace Bed Set. | Consists of
lace spread and two stans to match. | 350 |
| M 2066-* | Orchid Design Zion Bed Set. | Consists of
brocade pattern white spread and bolser
sheet to match, scalloped edges. For full
size bed. | 1500 |

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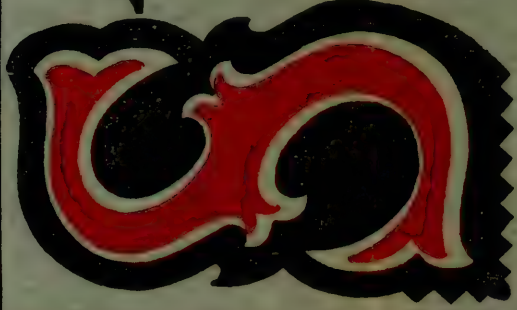
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AMMONIATED BORAX.

SAVE THIS TRADE MARK ENTIRE



ATTIN
GLOS
OAP.

SAVE THIS TRADE MARK ENTIRE

AMMONIATED BORAX

Stimmonia! wird jetzt zum Waschen allgemein gebraucht, während Borax ebenfalls ein gutes Fleimungsmittel ist und mit Erfolg angewendet wird. Die guten Eigenschaften beider in chemischer Verbindung zusammen bet man in der Seifen- und Waschanstalt bei deren Gebrauch kein Zufall von Stimmonia! zum Waschen nöthig ist.

**Derade, was man lange
gesucht hat.**

Die Form der Gasse ist original und ein bemerkenswerthmal ist, sie ist leicht zu gebrauchen und ohne besondere Anwendung. Es gibt nur einen einzigen Weg, die Gasse zu reinigen, und der ist ganz einfach. Gebt Gasse, welche ohne Arbeit reinigt, ist zu Markt zum Gebrauch, und enthalt Beschaffenheit, welche wohl die Kunden thren, aber auch die Gasse zu reinigen.

Man vergesse dies nicht, und lasse sich nicht kunden

Da wir die Zeit gekommen glauben, wo das Christenthum seinen in irdlich guten Stille braucht, haben wir die „Gotha'sche“ hergestellt und behaupten, daß, unserer inbegriffenen Befragung als Seitenstück.

geigelt werden kann.
 Esz nennen Sie "Garin" (Garin) weil Sie alle Bädle
 glänzend weiß macht, und da Sie wohl parfümiert und

THE use of Ammonia when washing has become very general, while Borax is also a very good purifier, and is used with excellent effect. The advantages of both of these, combined with chemical practices, will be found in Satin Gloss Soap, and one need add no Ammonia to the water when using it.

**JUST WHAT YOU HAVE BEEN
LOOKING FOR!**

Believing that the time has come when the public want a REALLY GOOD ARTICLE, we produce the "**Satin Gloss Soap**," and assert, after our many years experience as Soap Makers, that **THIS SOAP IS THE BEST** that can be produced for general purposes.

We call it "**Satin Gloss**" because it will impart a glossy whiteness to all clothes washed with it, and, being delicately perfumed and **STRICTLY PURE**, it makes an agreeable

The shape of the cake is original and is a particular feature—it being adapted to easy handling and no waste. There is only ONE way to thoroughly purify clothes, and that is to BOIL THEM! Any soap that professes to cleanse without labor is too strong to use and full of chemicals that may do the work but will NOT **REB** CLOTHES!

Remember that, and do not be deceived.

The Procter & Gamble Co.

Bath and Toilet Soap.

Cincinnati

Satine Washing Powder

Articles on this list will be mailed, postage paid by us. All mail matter should be addressed to

THE PROCTER & GAMBLE DISTRIBUTING CO.
176 Franklin Street, New York City.

For 25 Trade Marks.

- No. 22-Scarf Pin. Gold-plated, set with imitation amethyst.
- No. 24-Gold-plated Horseshoe Breast Pin.
- No. 27-Small Towel.
- No. 30-Aluminum Tea Strainer. Dull finish.
- No. 34-Child's Games. Assorted.
- No. 35-Paring Knife. Several shapes.
- No. 37-Silver-plated Sugar Shell.
- No. 38-Emery Knife Sharpener.
- No. 41-Silver-plated Pickle Fork.
- No. 48-Veil Pin. Gold-plated.
- No. 49-Baby Pins. 3 to a set. Gold-plated.
- No. 50-Mount Mellick Fringed Table Mat. 14 x 14. Stamped for Embroidery.
- No. 51-Six Doilies. 9 x 9. Stamped for Embroidery.
- No. 52-Tray Cloth. Duck, stamped for Embroidery. 17 x 26.

For 50 Trade Marks.

- No. 101-Silver-plated Child's Table Set.
- No. 102-Silver-plated Butter Knife and Sugar Shell.
- No. 103-Tie Towel. Hemmed. 18 x 36 in.
- No. 106-Sterling Silver Thimble. Assorted sizes.
- No. 107-Scarf Pin. Gold-plated, coral set.
- No. 110-Collar and Cuff Pins. Mother of pearl or turquoise enamel.
- No. 111-Hat Pin. 7 1/2 inches. Rose gold, assorted heads.
- No. 112-March Box. Silver-plated.
- No. 113-Breast Pin. Assorted designs.
- No. 114-Pocket Knife.
- No. 115-Bread Knife.
- No. 116-Cake Knife.
- No. 118-Silver-plated Pie Knife.
- No. 119-Silver-plated Salad Fork.
- No. 125-Ladies' Gold Shell Band Ring, or Ladies' Ring.
- No. 126-Ladies' Comb. Silverine back.

We respectfully request, however, that you bring your trade marks to one of our premium stores on the list below as you can then examine the many useful and beautiful articles which we offer and which are too heavy to mail.

- No. 127-Compass. 1 1/2-inch.
- No. 130-Large Towel. Good quality.
- No. 135-Pair Side Combs. Imitation tortoise shell.
- No. 148-Veil Pin. Heavy gold plate.
- No. 149-Gingham Apron. Checked goods.
- No. 150-White Lawn Apron.
- No. 432-Hat Pin. Sterling silver top.
- No. 433-Four Doilies. 10 x 10. Double hem-stitched, stamped for embroidery.
- No. 434-Centerpiece. 24 x 24. Stamped for embroidery.
- No. 435-Duck Splasher. 17 x 36. Stamped for embroidery.
- No. 436-Laundry Bag. Duck, 18 x 36. Stamped for embroidery.
- No. 438-Tray Cloth. 16 x 26. Linen Herring-bone, lace insertion.
- No. 441-Gold-filled Bar Pin. Set with imitation pearls.
- No. 461-Three Silver-plated Tea Spoons.

For 75 Trade Marks.

- No. 201-Silver-plated Berry Ladle.
- No. 202-Silver-plated Berry Spoon.
- No. 203-Gentlemen's Bill Fold.
- No. 204-Briar Pipe. Assorted finish.
- No. 205-Brooch. Rose gold finish.
- No. 208-Cuff Buttons. Roman gold.
- No. 209-Scarf Pin.
- No. 211-Pocket Knife.
- No. 212-Games. Choice of Fish Pond, Lotto, Backgammon, Ring and Toss.
- No. 214-Five-inch Scissors.
- No. 219-Carving Knife and Fork.
- No. 223-Ladies' Gold Shell Ring. With Egeria diamond, ruby, emerald or sapphire.
- No. 224-Ladies' Signet Ring.
- No. 225-Gold Shell Ring. Set with tiger eye or cameo.
- No. 227-Harmonica. Two styles.
- No. 300-Embroidery Scissors. 3 1/2 inch.
- No. 304-Ladies' Pocketbook or Purse.

וויי בעטען אייך אבער געקע-
לינט, דאס איזער זאלט בריינגען
איינערע טרייך טארקס צו איינע
פון אוועקע פרעכטען סטארס און
דיינערע ליסטע, ווייל איזער קענט
דאן בעקווערן דא פיעלע נויט-
פאללע און פראכטפאללע ארטליך-
לען וואס וויי אפפערן און וועלכע
ווער צו שווער צו שיקען פער פאסט

- No. 312-Two Silver-plated Table Knives.
- No. 445-Table Cover. Duck. Embroidered.
- No. 446-Pillow Top. Duck. Embroidered.
- No. 447-Nail Scissors. 3 1/2-inch.
- No. 448-Boy's Leather Catcher's Mitt.

For 100 Trade Marks.

- No. 303-Pocket Knife.
- No. 305-Ladies' Purse. Assorted colors.
- No. 309-Bracelet. With padlock and key.
- No. 310-Three Good Napkins.
- No. 315-Gold Shell Ring. Set with red carbuncle stone.
- No. 316-Ladies' Gold Shell Ring. Set with an assortment of stones.
- No. 317-Button-hole Scissors.
- No. 318-Cuff Buttons.
- No. 463-Two Silver-plated Table Spoons.
- No. 467-Two Silver-plated Dinner Forks.

For 150 Trade Marks.

- No. 419-Gentleman's Double-sided Watch Chain.
- No. 425-Six Silver-plated Oyster Forks.
- No. 426-Ladies' 10-inch Hand Bag.
- No. 427-Music Bag. With buckle and strap and two handles.
- No. 451-Black Satcen Skirt. With five-inch ruffle.
- No. 452-White Damask Table Cloth. Cotton. 48 x 69. Fringed.

For 200 Trade Marks.

- No. 407-Pair Nottingham Lace Curtains. Yards by 40 inches.
- No. 453-Couch Cover. 40 x 100.
- No. 455-Turkey Red Table Cloth. 48 x Fringed.

Rispettosamente noi
preghiamo di portare la
marche raccolte da voi, in
uno dei magazzini di premi
stampati sulla lista qui sotto,
cosi allora voi potrete osser-
vare bene i molti articoli utili
e belli che noi offriamo e che
sono troppo pesanti per es-
sere mandati per posta.

Premium Stores:

New York, 16 First Avenue, Near First Street.	New York, 115-117 E. 14th Street, Near Fourth Avenue.	New York, 441 Westchester Avenue, Bet. Bergen and Brook Aves.
New York, 226 East 85th Street, Near Second Avenue.	New York, 56 East 116th Street, Near Madison Avenue.	Brooklyn, 455 Gold Street, Opposite Loeser's.
Brooklyn, 33 Thornton Street, Near Broadway.	Brooklyn, 39 Osborn Street, Bet. Liberty and Glenmore Aves.	Paterson, N. J., 341 Grand Street, Near Main Street.
Elizabeth, N. J., No. 8 Julian Place, Opp. C. R. R. Depot.	Passaic, N. J., 64 Lexington Avenue, Near Maurice Street.	Newark, N. J., 295 Plane Street, Bet. Market and Bank Sts.

CLASSIC WHITE LAUNDRY SOAP
Is Made from Pure Vegetable Oils
Swift & Company, U.S.A.

CLASSIC



White Laundry Soap

CLASSIC WHITE LAUNDRY SOAP

An Easy Washer for Hard Water Use
Swift & Company, U.S.A.

Cole
W. C. Cole
W. C. Cole
 EXHIBIT
 100
 Filed *10/17* 191*6*
 Vol. 11. 1st. Div. 1st. Div.
 By *W. C. Cole*
 DEPT. OF COM. K

Save this Panel

Classic Wrappers

may be exchanged

—for—

Valuable Premiums

FOR THE RETURN OF THE SPECIFIED NUMBER OF
ZENO CHEWING GUM
PENNY WRAPPERS
 FOR THE YEAR 1906

NO. OF WRAPPERS	POSTAGE	NUMBER	ORDER BY NUMBER OF THE ARTICLE
100	2c stamp	1	Alaska Diamond Stick Pin.
150	2c "	2	Gravity Ball Novelty (Blow Gum).
200	2c "	3	Manicure Knife.
200	2c "	4	Four-piece Gents' Collar Button Set.
250	2c "	5	Gents' Pocket Toilet Set.
300	2c "	6	Fancy Stick Pin (Stone Setting).
300	4c "	7	Mouth Organ.
500	2c "	8	Bead Necklace.
600	4c "	9	Boy's Combination Pocket Knife.
650	2c "	10	Ladies' Cuff Pins (1 pair).
650	2c "	11	Baby Enamel Pins (1 pair).
800	5c "	12	Triplicate Mirror.
1000	5c "	13	Nut-Pick Set.
1300	5c "	14	Twelve-piece Secretary Outfit (useful).
1300	5c "	15	Three-piece Manicure Set.
1500	2c "	16	Signet Collar Pin.
1500	5c "	17	Boy's League Base Ball.
1700	2c "	18	Novelty Scarf Pin.
1700	2c "	19	Enamel Scarf Pin.
2100	4c "	20	Watch Charm (Stone Setting).
2300	5c "	21	Solid Nickel Watch Chain.
2500	5c "	22	Manicure File (Sterling Silver Handle).
3100	5c "	23	Gilt Watch Chain.
3300	5c "	24	Ladies' Collarette (Metal, Stone Setting).
7500	10c "	25	Boy's "Wizard" Nickel Watch.
15000	25c "	26	Ladies' 3-piece Toilet Set (Enamel Back, Silver Trim).

Send Wrappers by MAIL or EXPRESS, CHARGES ALL PAID.

Write your name and address plainly on Package.

BE SURE you send the Return Postage for the Present, which will be sent you as soon as possible.

Address all to **ZENO MFG. CO., Dept. C.**

150-160 W. VAN BUREN ST.,
 CHICAGO, ILL.

This offer expires December 31, 1906.

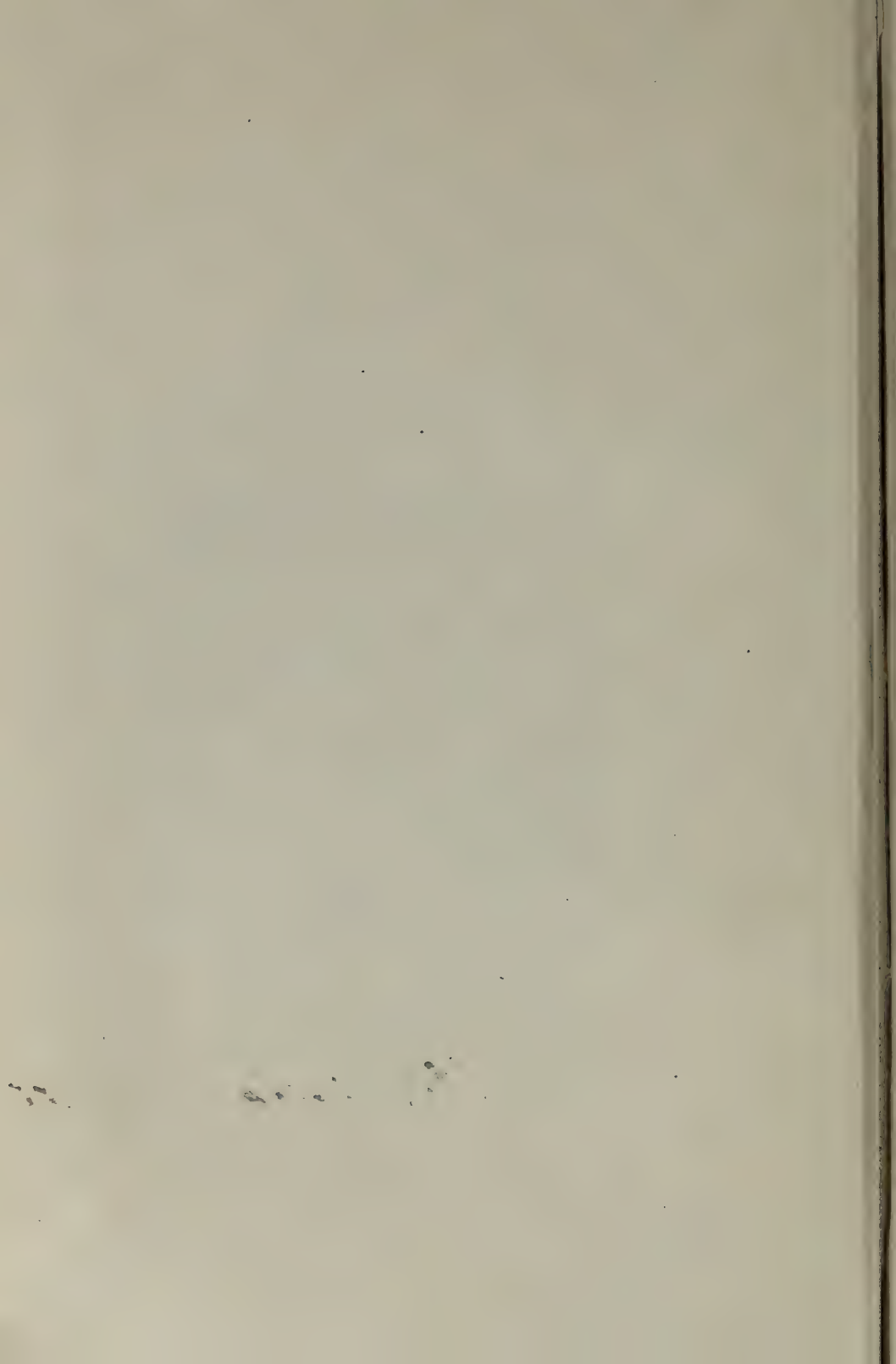
ZENO

Means GOOD CHEWING GUM

[Endorsed]: Cole vs. Hookstratten. No. C 3
 Eq. Def. Exhibit No. T. Filed Nov. 17, 1916.
 Wm. M. Van Dyke, clerk; by Geo. W. Feni-
 more, deputy clerk.



Stipulated Evidence.



*In the United States District Court, Southern District
of California, Southern Division.*

LOUIS M. COLE,

Plaintiff,

vs.

ED. G. HOOKSTRATTEN CIGAR COMPANY,
a Corporation,

Defendant.

In Equity No. C-3.

Petition for Order Allowing Appeal.

Louis M. Cole, plaintiff in the above entitled cause, conceiving himself aggrieved by the final order and decree filed and entered on the 4th day of December, 1916, in the above entitled cause, whereby it was ordered, adjudged and decreed that the bill of complaint in this cause be (and the same was thereby) dismissed for want of equity at the costs of plaintiff, by his solicitor and counsel, Joseph F. Westall, Esq., hereby appeals from said decree and petitions this honorable court for an order allowing plaintiff to take and prosecute said appeal to the honorable the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons and upon the grounds specified in assignments of error which are filed herewith, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which plaintiff shall give and furnish upon such appeal; and that a citation issue as provided by law, and that a certified transcript of the records, proceedings and papers upon which said decree was based be forthwith transmitted to the United

States Circuit Court of Appeals for the Ninth Circuit, in accordance with the rules in equity promulgated by the Supreme Court of the United States, and the statutes made and provided, together with the exhibits on file in this case, or duly certified copies thereof.

JOSEPH F. WESTALL,

Solicitor and of Counsel for Plaintiff, Louis M. Cole.

[Endorsed]: No. C-3 Equity. In the United States District Court, Southern District of California, Southern Division. Louis M. Cole, plaintiff, vs. Ed. G. Hookstratten Cigar Company, a corporation, defendant. Petition for order allowing appeal. Filed Jan. 6, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Joseph F. Westall, attorney at law, 639 Wesley Roberts Building, Los Angeles, Cal. A 1493, Main 3551.

*In the United States District Court, Southern District
of California, Southern Division.*

LOUIS M. COLE,

Plaintiff,

vs.

ED. G. HOOKSTRATTEN CIGAR COMPANY,
a Corporation,

Defendant.

In Equity No. C-3.

Assignments of Error.

Comes now the plaintiff above named and specifies and assigns the following as errors upon which he will rely upon his appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment

and decree of this court entered on the 4th day of December, 1916:

1. That the court erred in holding that the Cole reissue patent No. 14,000 had not been infringed by defendants.

2. That the court erred in not entering a decree referring this cause to a master for an accounting.

3. That the court erred in not granting an injunction to restrain the defendants as prayed in the complaint.

4. That the court erred in dismissing the bill of complaint filed in this cause for want of equity.

5. That the court erred in awarding costs to said defendant.

Wherefore, the said plaintiff prays that said judgment and decree of this court made and entered on the 4th day of December, 1916, and that the bill of complaint in this cause be dismissed, and dismissing the same for want of equity at the cost of plaintiff be reversed, and that the United States District Court for the Southern District of California, Southern Division, be directed to enter a judgment and decree granting the relief prayed in the complaint.

JOSEPH F. WESTALL,

Solicitor and of Counsel for Plaintiff.

[Endorsed]: No. C-3 Equity. In the United States District Court, Southern District of California, Southern Division. Louis M. Cole, plaintiff, vs. Ed. G. Hookstratten Cigar Co., a corporation, defendant. Assignments of error. Filed Jan. 6, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk.

Joseph F. Westall, attorney at law, 639 Wesley Roberts Building, Los Angeles, Cal., A 1493, Main 3551.

*In the United States District Court, Southern District
of California, Southern Division.*

LOUIS M. COLE,

Plaintiff,

vs.

ED. G. HOOKSTRATTEN CIGAR COMPANY,
a Corporation,

Defendant.

In Equity No. C-3.

Order Allowing Appeal.

Plaintiff having filed his petition for an order allowing an appeal in the above entitled cause from the order and decree of this court made and entered on the 4th day of December, 1916, together with his assignments of error, now, upon motion of Joseph F. Westall, Esq., solicitor for plaintiff, it is ordered that said appeal be, and hereby is allowed to plaintiff to the United States Circuit Court of Appeals for the Ninth Circuit from the said order or decree made and entered by this court on the 4th day of December, 1916, dismissing the bill of complaint in this cause for want of equity at the costs of plaintiff; and that the amount of plaintiff's bond on said appeal be, and the same is hereby fixed at the sum of two hundred and fifty (\$250.00) dollars.

It is further ordered that upon the filing of such security, a certified transcript of the records and proceedings herein be forthwith transmitted to said United

States Circuit Court of Appeals for the Ninth Circuit, in accordance with the rules in equity by the Supreme Court of the United States promulgated, and in accordance with the statutes made and provided, together with the exhibits on file in this case.

Entered this 6th day of January, 1917.

BENJAMIN F. BLEDSOE,

United States District Judge.

[Endorsed]: No. C-3 Equity. In the United States District Court, Southern District of California, Southern Division. Louis M. Cole, plaintiff, vs. Ed. G. Hookstratten Cigar Co., a corporation, defendant. Order allowing appeal. Filed Jan. 6, 1917. Wm. M. Van Dyke, clerk; by T. F. Green, deputy clerk. Joseph F. Westall, attorney at law, 639 Wesley Roberts Building, Los Angeles, Cal., A 1493, Main 3551. 4 Eq. Jl—152.

*In the United States District Court, Southern District
of California, Southern Division.*

LOUIS M. COLE,

Plaintiff,

vs.

ED. G. HOOKSTRATTEN CIGAR CO. (a Corporation),

Defendant.

In Equity C-3.

Bond on Appeal.

Know all men by these presents, that Fidelity and Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of

the state of Maryland and duly licensed to transact business in the state of California, is held and firmly bound unto Ed. G. Hookstratten Cigar Company, a corporation, defendant in the above entitled suit, in the penal sum of two hundred and fifty dollars (\$250.00), to be paid to the said Ed. G. Hookstratten Cigar Company, a corporation, its successors and assigns, which payment well and truly to be made the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

Sealed with the corporate seal and dated this 24th day of May, 1917.

The condition of the above obligation is such that, whereas the said plaintiff, Louis M. Cole, in the above entitled suit, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse an order or decree made, rendered, and entered on the fourth day of December, 1916, dismissing the bill of complaint in the above entitled cause for want of equity at the costs of plaintiff by the District Court of the United States, for the Southern District of California, Southern Division, in the above entitled cause;

Now, therefore, the condition of the above obligation is such that if the said Louis M. Cole shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his appeal, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof, the seal and signature of said principal is hereunto affixed, and the corporate name of said surety is hereto affixed by its duly authorized

attorneys in fact at Los Angeles, California, this 24th day of May, 1917.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND. (Seal)

By Harry D. Vandever, (Seal)

Its Attorney in Fact.

Attest W. M. Walker, (Seal)

Its Agent.

(Seal)

State of California, County of Los Angeles—ss.

On this 24th day of May, 1917, before me, C. M. Evarts, a notary public in and for the said county of Los Angeles, state of California, residing therein, duly commissioned and sworn, personally appeared Harry D. Vandever, known to me to be the attorney in fact and W. M. Walker, known to me to be the agent of the Fidelity and Deposit Company of Maryland, the corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as attorney in fact and agent, respectively.

(Seal)

C. M. EVARTS,

Notary Public in and for the County of Los Angeles,
State of California.

Approved. TRIPPET, Judge.

[Endorsed]: Original. No. C-3. In Equity. In the District Court of the United States, in and for the Southern District of California, Southern Division. Louis M. Cole, complainant, vs. Ed. G. Hookstratten Co., defendant. Bond on appeal. Filed May 28, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy

clerk. Westall and Wallace, attorneys at law, Suite 516 Trust & Savings Bldg., Los Angeles, F 5683, Main 8508, attorneys for plaintiff.

Praeipe Under Equity Rule 75.

[Endorsed]: U. S. District Court, So. District of California, So. Div. Eq. No. C 3. Louis M. Cole vs. Ed. G. Hookstratten Cigar Co. Stipulated evidence. Filed Jun. 30, 1916. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. James R. Offield, patents, trade marks, copyrights, Monadnock Bldg., Chicago.

In the United States District Court, Southern District of California, Southern Division.

LOUIS M. COLE,

Plaintiff,

vs.

ED. G. HOOKSTRATTEN CIGAR COMPANY,
a Corporation,

Defendant.

In Equity No. C-3.

Praeipe Under Equity Rule 75.....

To the Clerk of Said Court:

You will please incorporate into the transcript on appeal from this court to the Circuit Court of Appeals for the Ninth Circuit, on an order allowing appeal on behalf of plaintiff made and entered on the sixth day of January, 1917, the following portions of the record of this cause in equity:

(1) The bill of complaint herein filed December 14, 1915;

(2) The answer of defendant filed January 3, 1916;
(3) Stipulation as to evidence filed June 30, 1916;
(4) Stipulated evidence filed June 30, 1916 (photostat copies will be furnished to the transcript clerk);

(5) Copies of Defendant's Exhibits "A" and "B" (file wrapper contents of Cole original and reissue patents);

(6) The record of proceedings on the trial of this case as appearing in "Plaintiff's statement on appeal under rule 75" as filed herewith;

(7) Copies of Defendant's Exhibits C to J, inclusive (specifications and drawings of certain patents, copies of which will be procured from the patent office and delivered to the transcript clerk);

(Note: Defendant's Exhibits K to S, inclusive, are original labels, copies of which are found in the "Stipulated evidence filed June 30, 1916," mentioned (4) *supra*, and need not be again copied.)

(8) Copy of Defendant's Exhibit T (a chewing gum circular published by the Zeno Manufacturing Company,—a photostat copy of which will be procured for use of the transcript clerk);

(Note: The original of Defendant's Exhibit U, x x, 4 packages of gum, being physical exhibits, will have to be sent to the Court of Appeals.)

(9) Opinion of the court (to be hereafter filed if authorized by the court);

(10) Decree entered December 4, 1916;

(11) The assignment of errors filed herein;

(12) Petition for order allowing appeal herein;

(13) Order allowing appeal entered on January 6, 1917;

(14) Citation on appeal issued on March , 1917;

(15) A certificate under seal stating the cost of the record and by whom paid;

(16) This præcipe;

(17) The names and addresses of the parties and their attorneys;

(18) Bond on appeal.

Respectfully,

JOSEPH F. WESTALL.

Approved. BLEDSOE, Judge.

[Endorsed]: Original. No. In Equity C-3. In the District Court of the United States, in and for the Southern District of California, Southern Division. Louis M. Cole, complainant, vs. Ed. G. Hookstratten Cigar Company, a corporation, defendant. Præcipe under equity rule 75. Received copy of the within præcipe this 10th day of May, 1917. Ed. G. Hookstratten Cigar Co., Inc., by W. A. Pickarts, secy. Filed May 11, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Westall and Wallace, attorneys at law, Suite 516 Trust & Savings Bldg., Los Angeles, F 5683, Main 8508, attorneys for plaintiff.

No. 3050.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Louis M. Cole,

Appellant,

vs.

Ed. G. Hookstratten Cigar Com-
pany, a Corporation,

Appellee.

BRIEF FOR APPELLANT.

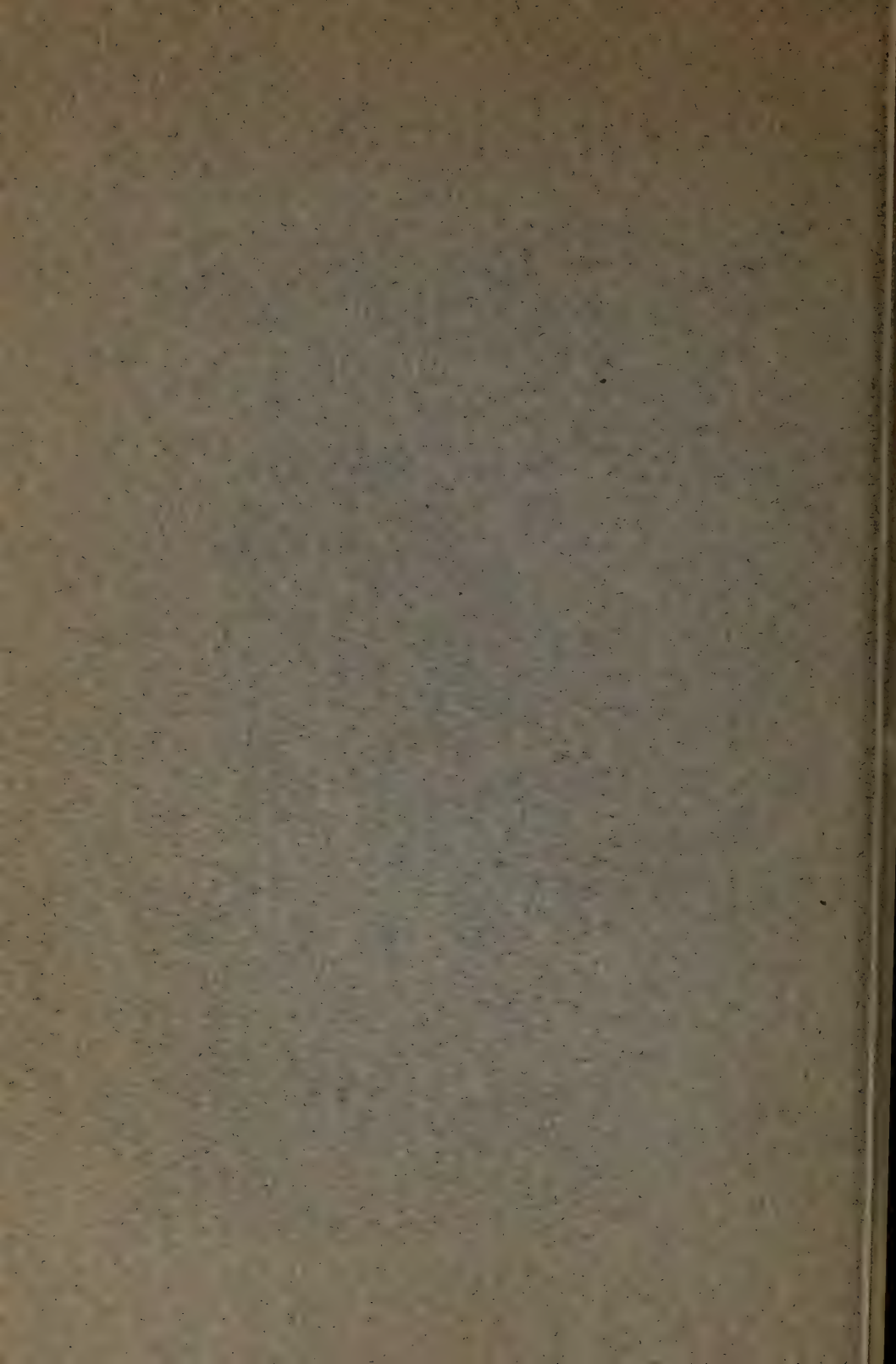
FILED

JAN 21 1918

F.D. 25-1000

JOSEPH F. WESTALL,

Solicitor and of Counsel for Appellant.



No. 3050.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Louis M. Cole,

Appellant,

vs.

Ed. G. Hookstratten Cigar Com-
pany, a Corporation,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Appellant charges infringement of claims 2 and 3 of reissued Letters Patent No. 14,000, granted to Louis M. Cole for Label, a copy of the specification and drawings of which is to be found as Plaintiff's Exhibit I opposite page 32 of the Transcript.

A reference to such specification and drawings shows the subject-matter of the patent in suit to be a printed or lithographed paper label, which, while shown in the drawing as encircling a tin can, is not in any manner

limited to such cylindrical container, but may be used with any form of carton or package in which commercial products of various kinds are commonly distributed.

We cannot improve upon the language of claim 3 of the patent as a most clear and succinct description of the invention:

“3. As a new article of manufacture a label adapted to be detachably secured around a package, said label having display matter relating to the contents of the package on its outer face, the inner face of said label bearing useful printed matter, said label being provided on the outer face thereof with a line out of registry with said useful printed matter indicating where the label may be severed to remove the entire label without mutilating the printed matter on its inner face.”

Defendant stipulates [Transcript, bottom of pages 27-28] that it has made, used and sold prior to the institution of this suit packages of Wrigley's Spearmint Chewing Gum labeled like Plaintiff's Exhibit 2. An examination of this package (brought up as a physical exhibit under rule 34 of this court) will show that it is encircled with a label, which label, by reason of the printing on its inner face, forms when removed a coupon. The appellant contends that the language of said claims 2 and 3 of the patent in suit read literally upon this chewing gum package, and thus establishes infringement. This with the admissions of the answer (not material to be here specifically referred to) constitutes plaintiff-appellant's case.

The usual defenses of want of invention, anticipation by prior patents and by prior public use, and non-infringement are pleaded, as well as the more unusual one that the reissue claims are invalid because of having been broadened.

Defendant's Exhibits K to S, inclusive, are, with the exception of the first, which is a label of Star Brand Condensed Milk, soap wrappers and have all been stipulated as having been made and publicly used and sold in various parts of the United States prior to the date of invention of the subject matter of the patent in suit.

It was also stipulated [Transcript page 25] that the Zeno Manufacturing Company of Chicago, Illinois, publicly used, prior to the date of invention of the Cole device, labels such as shown opposite Transcript page 59, wherein an adhesive was so applied near the meeting ends of the labels as to leave one edge free whereby the label might be readily removed by pulling back the free edge.

As very pertinent to an understanding of the issues, we also called the court's attention of the stipulation [Transcript, page 25]—

“that Wm. Wrigley, Jr. Company of Chicago, Illinois, publicly used prior to January 1, 1908, labels adapted to be wrapped around five sticks of chewing gum and having their meeting edges secured together by means of an adhesive which was applied behind one of the edges so as to leave a free edge whereby the label might be readily removed from the package. It is further stipulated, however, that insofar as the Wrigley

label is concerned, this company did not, prior to January 1, 1908, employ a label with a coupon or profit-sharing certificate printed upon the inside thereof, nor did it print a label with the words, "Remove carefully—Pull back here," printed thereon. A package of chewing gum containing a label as used by Wm. Wrigley, Jr. Company prior to January 1, 1908, is hereto attached to this stipulation, it being admitted, however, by the defendant that such prior label was not in coupon form as above noted."

A number of specifications and drawing of prior letters patent (constituting Defendant's Exhibits C to I, inclusive) were stipulated into evidence in the attempt to show want of invention, anticipation, or a necessity for narrow interpretation of the claims in suit.

While, as stated, the answer pleads invalidity of the reissue on account of the broadening of the claims, and contains a denial of performance of the conditions precedent to the granting of a valid reissue of letters patent, no other evidence upon any of such suggested issues was introduced, unless by some possibility defendants should contend that the same is contained in the copy of the file wrapper contents of the original and reissued letters patent.

The court, as the final decree [Transcript, page 17] and the opinion of the court [Transcript, page 19] will show, held the claims sued on valid but not infringed, and the only finding which we contend to be an error now relied upon by appellant is the failure of the trial court to find infringement, and to award the usual injunction and accounting.

THE ISSUES.

The defendant-appellee will no doubt attempt to support the court's finding of non-infringement.

The combination of elements of the claims in suit is not found in any of the labels, wrappers, or patent drawings and specifications put in evidence by defendant-appellee. There is, therefore, no room for any contention on the part of appellee that the subject-matter of the claims in suit is anticipated. Defendant's prior art showing, however, will doubtless be used in an attempt to support an argument that the combination of the claims is void for want of invention. We anticipate no contention that all conditions precedent to the granting of valid reissued letters patent were not complied with, because the record contends no evidence attacking the usual presumption of validity on this score.

The only defenses, therefore, which will be urged on this appeal, so far as we can foresee, are: (1) non-infringement; (2) want of invention; and possibly, (3) invalidity of the reissue because of broadened claims.

Infringement.

It is believed that a comparison of the language of claims 2 and 3 of the reissued letters patent in suit with defendant's package of Wrigley's Spearmint Chewing Gum (Plaintiff's Exhibit 2) will convince the court of the validity of appellant's contention that such claims read literally and precisely upon defendant's label.

The element described as “a line out of registry with said useful printed matter indicating where the label may be severed,” reads either on the line formed by the free edge of defendant’s label just below the words “Remove carefully—Pull back here” or upon either the waved line beneath, or the straight line above, said words.

There might at first glance appear to be some room for construing the word “line” as indicating a printed mark on the label and as not applicable to the edge of the label which when pasted in place forms the line. Such a construction, however, would not be tenable because, in the first place, it would not be consistent with the specification and drawings, in the light of which, in accordance with elementary law, the claim must be construed; for the specification at line 67, page 1, distinctly says: “The line for cutting the label is *preferably* located to one side of the lapped ends, so that the cut need only be through a single thickness of paper * * *.” Patentee thus distinctly recognizes that the line may exactly abut the end of the label or may be slightly beneath the end of the label, so long as the words “cut on this line,” or words of similar import, appear adjacent thereto.

To construe, therefore, the word “line” of the claim as a printed line only, and not also the line formed by the end of the label, would be confining the patentee to what he described merely as a “preferable” construction, and further, would ignore the well settled law that a change of form does not avoid infringement.

In the 5th edition of Walker on Patents, page 453, section 363, it is said:

“A change of form does not avoid an infringement of a patent, unless the form shown in the patent is necessary to the functions which the patent ascribes to the invention; or unless that form is the distinguishing characteristic of the invention; or is essential to its patentability; or unless the patentee specifies a particular form as the means by which the effect of the invention is produced; or otherwise confines himself to a particular form of what he describes. Even where a change of form somewhat modifies the construction, the action or utility of the patented thing, non-infringement will seldom result from such a change.”

Under section 365, page 454, Walker on Patents (5th edition), the author collects and analyzes the cases upon this particular phase of the patent law.

We also respectfully urge that if the word “line” of the claim means “printed line” and is not fully met by the printed lines on defendant’s label, both above and below the words “Remove carefully—Pull back here,” the patentee, being entitled to all equivalents of each of the elements of his combination, is entitled to a decision that the line formed by the edge of the paper of the defendant’s label performs the same function in substantially the same manner, and constitutes substantially the same means as the printed line illustrated in the Cole drawings, and is, therefore, the mechanical equivalent of such printed line.

There seems to be some suggestion in the opinion of the trial court that the word “sever” of the claim

might be construed as "cut" and that, therefore, defendant's label, which is not cut, but which is pulled apart, would not properly be described by the language of the claims.

We are convinced that such an interpretation is not a logical one nor required by the specification and drawings or the state of the art.

It is unnecessary to remind the court of the elementary canon of construction that words are to be understood in their ordinary and common signification. The word "sever" is a broader term than "cut." It was obviously selected because it covered both tearing apart in any manner as well as cutting. In the Standard Dictionary we find "sever" defined as—

"3. To divide, cut, or sunder into two or more parts; cleave asunder; as to sever a knot or rope. To make a division or separation."

"Sunder" is defined by the same authority as follows:

"To dissolve or prevent connection between; break; part; disunite. Division into parts; separation."

No reason is suggested why the word "sever" in the claim should be given any other than its ordinary and common meaning.

The inventive idea of the patent in suit did not reside merely in the specific manner of the separation of the ends of the label. The essence of the invention is surely as fully appropriated by an infringer who provides for the tearing apart or pulling apart of the

label at the indicated point as by he who cuts it with a knife.

To summarize our contentions on the question of infringement: The claims in suit are directed to a specific combination of elements and are narrow, limited claims. Their language is untechnical and perfectly intelligible, even without recourse to the aid of the specification and drawings. Neither the state of the art nor any other portion of the patent contract requires any narrowing or any forced or unnatural interpretation of the language used. Giving to the words their usual, ordinary, non-technical, and proper signification, they read plainly both in letter and in spirit upon defendant's label. It is, therefore, respectfully urged that the finding of the trial court of non-infringement is erroneous.

Alleged Anticipation.

Defendant's Exhibits L to S, inclusive, are soap wrappers. There is no evidence nor stipulation that any of them is "detachably *secured*" around its respective package, as called for by the claims in suit. Being mere loose wrappers held in place by folding, none of them have "a line * * * indicating where said label should be severed to remove the entire label without mutilating the printed matter on its inner face," as described in the claims. Owing to the method of use of such wrappers, no line indicating where the label should be severed is required.

The object of such printed line as shown, for instance, on Defendant's Exhibit N (Babbitt's Best Soap), is not to provide for severing which will per-

mit the "entire label" to be removed without mutilation, because the entire label is plainly designed to be removed without cutting or severing—by merely unwrapping or unfolding before the coupon is cut out. When such soap wrappers are unfolded and removed from their respective packages the method of separating the useful printed portions is not different in principle from the method of using the ordinary coupon bond. After removing they do not come within the description of "detachably secured" labels; they are mere *unattached* papers, and their printed lines and directions for cutting out portions only come into use when they have *ceased to be labels*.

We do not see that any of these soap wrappers advance defendant's case in the slightest, because the most they show is that one or two elements of the patented combination was old. This establishes no more than the law conclusively presumes. As stated by Hopkins on Patents, Vol. I, page 122:

"In a combination claim, as a matter of law, every element is conclusively presumed to be old, whether or not it is old in fact. As Mr. Justice Brown has said: 'The failure to claim either one of the elements separately raises a presumption that no one of them is novel.'"

Citing:

Richards v. Chase Elevator Co., 159 U. S. 477,
486, 40 L. Ed. 225, 228.

In the case of Defendant's Exhibit K (Star Milk Label) no indication is contained on the label as to

how it is to be removed from the can. So far as the evidence discloses, the label may be pasted its entire length around the container and it may be necessary to remove it by soaking. It is not shown to be "detachably secured," in the sense of the patent in suit, to the container. It has no line indicating where the label may be severed to remove the *entire label* as called for by the claims.

In our examination of the patented art, as shown of record, it is important to note that the two nearest references, i. e., Defendants' Exhibit G (Martin and Fietsch Patent No. 1,004,055) and Defendant's Exhibit J (Braly Patent 589,406) were cited and fully considered by the patent office examiner on the Cole reissue application [Transcript, page 49]. These references are surely much more pertinent than either the soap labels or the Star Milk label. The patent to Braly is particularly to be noticed for it shows a portion of a label described as having printed matter on both sides with perforations indicating where the label may be torn to remove the desired portion. The Martin and Fietsch patent shows only a detachable trading stamp forming part of a label.

A comparison of the language of the claims in suit shows very clearly that they do not read on any patented art. The most that can be said concerning this so-called prior art is that one of these patents show one feature of the combination of the claims in suit and another another feature, etc. Does this not make clearly applicable the law as announced by this court

in *Stebler v. Riverside Heights Orange Growers' Association*, 205 Fed. 735?

"True, we may pick out one similarity in one of these devices, and one in another, and still one in another, and by combining them all, anticipate the inventive idea expressed in the Strain patent, but the combination constituting the invention is not found in any one of them. As we had occasion to say in *Los Alamitos Sugar Co. v. Carroll*, 173 Fed. 380: 'It is not sufficient to constitute an anticipation, that the device relied upon might by a process of modification, reorganization, or combination, be made to accomplish the function performed by the device of the patent.' Citing *Western Electric Co. v. Home Telephone Co.*, 85 Fed. 649; *Topliff v. Topliff*, 145 U. S. 156; *Gun v. Bridgeport Brass Co.*, 143 Fed. 239; *Ryan v. Newark*, 96 Fed. 100; *Simonds R. M. Co. v. Hawthorn Mfg. Co.*, 90 Fed. 201-209; *Gormully & J. Co. v. Stanley Cycle Co.*, 9 Fed. 379; *Morrow v. Shoemaker*, 59 Fed. 120."

At page 264, Sec. 213, rule XXI, Hopkins on Patents says:

"IT DOES NOT CONSTITUTE ANTICIPATION OF A COMBINATION TO FIND EACH OF ITS ELEMENTS IN SOME STRUCTURE OF THE PRIOR ART. (Here, quoting the language of Putnam, J., in *Heap v. Tremont and Suffolk Mills*, 82 Fed. 449): 'It is probably very true that by selecting from the various prior machines in this particular art, all the elements of the device in suit could be brought together. But to hold that this fact always defeats novelty would be to shut out every combination of old elements from the protection of the patent laws.

A combination (quoting Welker, J., in Worswick Mfg. Co. v. Steiger, 17 Fed. 250, 252) can only be anticipated by a prior device having identically the same elements *or the mechanical equivalents of these that are not used*. It will not do to find in older devices a portion of these elements in one machine, another portion in a second machine, another in a third, and so on, and then say that this device is anticipated.’”

Measured by these elementary and well settled rules, it is submitted that defendant’s showing of the prior art utterly fails to establish the defense of anticipation.

Invention.

It has been the experience of all modern nations that wise and well administered patent laws are by far the most effective stimulus to the advancement of our material civilization.

It is believed that the wonderful development of the modern industrial arts must be attributed almost exclusively to the protection we afford our inventors. The greatest good demands a broad and liberal application of such laws with their reason and spirit ever in view, and an earnest effort on the part of our courts to uphold, wherever possible, patents brought before them for adjudication. Any one who has given the subject consideration will have found our patent office with its examination system the most efficient in the world. Special training and superior fitness to determine questions of patentability are required of our patent office examining corps. The allowance of a patent by such

eminently qualified tribunal constitutes an adjudication of patentable invention and novelty, which, we submit, should be accorded the greatest weight and respect. The court should be at great pains to avoid stultifying a solemn act of the Government of the United States through such specially constituted patent office tribunal.

The presumption is that the examiner gave careful consideration and accorded due weight to all pertinent patent art, and we have the positive evidence of the file wrapper contents that the closest references—those we contend, much nearer than anything now specially insisted upon by defendant—were carefully weighed by him. There is no new evidence in the present record which might have changed the examiner's opinion. We respectfully urge, therefore, that under such circumstances any doubt in the mind of the court should be resolved in favor of the patentee, and the presumption of validity should prevail.

The affirmative of this question of invention is always an awkward one to handle, for by what test shall we determine where to draw the line between invention and mere mechanical skill? Surely the simplicity of the device furnishes no argument of want of invention; for the mechanical skill which designs, constructs and assembles the most complicated modern machinery receives a very trifling compensation as compared with the golden reward which is lavished by that great judge of inventive worth, the general public, upon the originators of such simple devices as the safety pin, the crimped hair pin, the rubber on

the end of a pencil, barbed wire, the point of a tooth pick, the paper clip, the toy wooden ball attached to a rubber band, and many others.

In *Webster Loom Co. v. Higgins*, 105 U. S. 580, the court, after stating that it could not assent to the argument that the combination of different parts or elements for attaining the object in view was so obvious as to merit no title to invention, remarks:

“Now that it has succeeded, it may seem very plain to anyone that he could have done it as well. This is often the case with inventions of the greatest merit.”

In *Western Mineral Wool Co. v. Globe Mineral Wool Co.*, 75 Fed. 400, near the bottom of page 402, the court said:

“The claim is now made, as has frequently been the case, that the process covered by the invention is so plain and simple as to exclude the possibility of inventive genius. But why was it never resorted to before, if so simple? Why not used, if so plain? It may be simple, yet nevertheless an invention, and while now very plain it is still meritorious.”

But we struggle with the feeling that we are arguing matters of law frequently applied and well understood by this court. Take, for instance, the case of *Diamond Patent Co. v. S. E. Carr*, 217 Fed. Rep. 400, in which this court fully considered a similar question involving the validity of the *Weber All-Glass Show Case Patent*. The structure of the patent was made of plates of glass secured together by thin and narrow strips of felt coated with cement. In the attack upon the validity

of the patent for want of invention and for anticipation, it was shown that all-glass show cases were old and that the use of cement-coated felt strips to secure their plates together was old. Weber's only contribution to the art seemed to be his "superficially coating" of the strips of felt with cement,—which was necessary to preserve their resiliency. The court very properly in that case found invention to reside in the making of resilient what was not resilient before—in merely altering the character of the adhesive.

On page 405 it was said:

"Nor is anticipation made out by a device which might, with slight modification, be made to perform the same function. The invention must be complete and capable of producing the result. One should not be deprived of the results of a successful effort merely because someone else has come near it."

Bringing to bear the best light possible on this question of invention, we believe it will be found that the decision of the patent office examiner was sound, and that the claims present a clear margin of patentable invention over all prior art now cited.

Conditions Precedent to Reissue Complied With.

In support of the assertion of this heading, and in the absence of something more than the mere denial of defendant's answer of the allegations of the complaint as to compliance with conditions precedent to the issuance of reissued letters patent, we submit the showing made by the file wrapper contents of both

the original and reissued letters patent. There has been no attempt to rebut the usual presumption of regularity of all proceedings leading up to the grant of the patent in suit.

Broadening Claims of Reissue to Cover Real Invention.

While, as before stated, this alleged defense is pleaded in the answer, it was not urged on the trial, and it is not believed that it will be pressed on this appeal.

It will be noted from the oath forming part of the reissue application [Transcript, bottom of page 47] that the reason given for the surrender of the original patent and the application for the reissue was "that the specification thereof is defective and that such defect consists particularly in the claims which do not cover [applicant's] invention." The applicant further stated upon oath:

"That the errors which render said patent inoperative arose from inadvertence without any fraudulent or deceptive intention on the part of deponent; that the following is a true specification of the errors which it is claimed constitutes such inadvertence, relied upon:

"Deponent, not being versed in the phraseology of claims, was deceived into thinking that the said claims covered his invention and protected him to the fullest extent under the law; whereas the claims are in fact faulty and erroneous in specifying the label as loose and including the flanged construction of the can."

The reissue application is thus based flatly upon the insufficiency of the claim of the original patent on account of its narrowness.

As a comparison of dates will show, the reissue application was filed several months less than two years after the granting of the original patent. No question of intervening rights is raised in the record.

We believe that the great weight of modern authority will sustain the proposition that any failure to secure in the original patent the invention to which the applicant was entitled, which was not the result of a deliberate act, or was not the result of an intention to deceive, may be attributed to inadvertence, accident or mistake.

One of the most thoroughly considered cases on reissue is that of *Crown Cork and Seal Co. v. Aluminum Stopper Co.*, 108 Fed. 845, decided by the Circuit Court of Appeals for the Fourth Circuit. In that case the court said:

“A review of the earlier decision of the Supreme Court would seem to show that by ‘defective or insufficient specifications’ was meant any failure to describe or claim the complete invention upon which the application for the patent was founded, and that ‘inadvertence, accident, or mistake’ was used in antithesis to fraudulent intent, and that the right to reissue depends upon any failure to make the specification and claims legally adequate for their purpose, if due to any cause except an intention to deceive.”

In the case just quoted from there was a broadened claim and no showing of any particular inadvertence,

accident, or mistake except an allegation that the application papers were hurriedly prepared, and that neither applicant nor his attorneys noticed the defects throughout the years of the prosecution of the application.

In the case of *Houghton v. Whitin Machine Works*, 153 Fed. Rep. 740, it was held by the Circuit Court of Appeals for the First Circuit, that the failure to make the claims of sufficient scope may be regarded as inadvertence, accident, or mistake. In *Moneyweight Scale Co. v. Toledo Computing Scale Co.*, 187 Fed. Rep. 826, the Circuit Court of Appeals for the Seventh Circuit said:

“The original specification alone on its face was sufficient proof that, if a claim adequate to cover the improved scale was never drawn, the failure came from the lack of an attentive comparison of the submitted claims with the invention particularly pointed out in specification. This was inadvertence, ‘lack of heedfulness or attentiveness’ irrespective of the real competence or incompetence of the solicitors.”

Very few inventors understand the nature of a patent claim. It is the most difficult part of the specification to draw with accuracy. Courts have taken these things into consideration in permitting inadvertence in failing to claim the real invention to be corrected by reissue. There can be no doubt under the authorities that broadened reissues are permissible.

Conclusion.

In conclusion we urge that the claims in suit both in letter and in spirit read on defendant's labels; that their combination of elements is not found in any prior art device in evidence; that the evidence shown by the file-wrapper contents of the patent in suit to have been considered by the patent office examiner who allowed the reissue claims, is stronger and more pertinent than any of the alleged anticipations now before the court; that the adjudication of the patent office in granting the patent, should, under such circumstances, be affirmed, and the usual presumption of validity of the reissue should prevail.

An examination of the file-wrapper contents shows every step upon which the validity of the reissue might depend to have been fully complied with, and the law is well settled that broadened reissues, under the circumstances of the present case, are permissible.

It is respectfully submitted that the claims in suit are valid and infringed, and that the decree of the trial court should be reversed with costs.

Respectfully submitted,
JOSEPH F. WESTALL,
Solicitor and of Counsel for Appellant.

United States
Circuit Court of Appeals *7*
For the Ninth Circuit.

LOUIS M. COLE,

Appellant,

VS.

ED. G. HOOKSTRATTEN CIGAR COMPANY (a
Corporation),

Appellee.

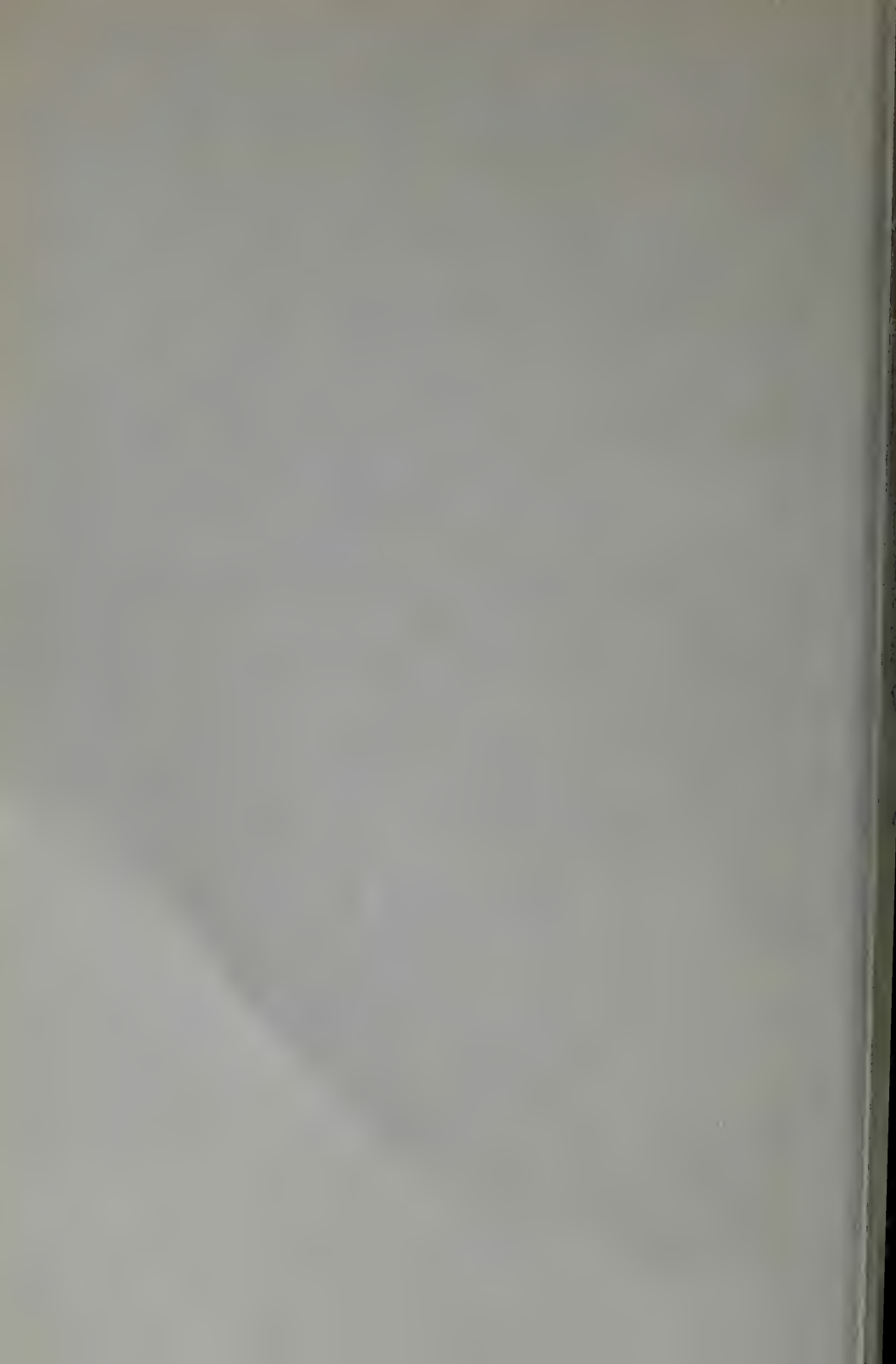
BRIEF FOR APPELLEE.

FILED

FEB 6 - 1918

F. D. MONCKTON,
CLERK.

JAMES R. OFFIELD,
Solicitor and of Counsel for Appellee.



*United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 3050.

LOUIS M. COLE,

Appellant,

vs.

ED. G. HOOKSTRATTEN CIGAR COMPANY
(a Corporation),

Appellee.

Brief for Appellee.

The appellant in this cause is the alleged inventor of letters patent of the United States No. 1,054,826, dated March 4, 1913, and reissued October 26, 1915, No. 14,000. The appellant, in so far as the record shows, merely licenses or attempts to license the use of his invention to other manufacturers.

The appellee, Hookstratten Cigar Company, is a corporation operating a plurality of cigar-stores in the city of Los Angeles, and perhaps elsewhere, and among other things sells over its counters the chewing-gum product of Wm. Wrigley Jr. Co., of Chicago, Illinois, the manufacturers of Spearmint gum.

It is contended by the appellant that the label used by Wm. Wrigley Jr. Co. upon its Spearmint chewing-gum is an infringement of the reissue letters patent, and that the Hookstratten Cigar Company is an infringer by reason of its sale of the alleged infringing label.

The cause was tried in open court in the United States District Court of California, Southern Division, before his Honor, Judge Bledsoe, a copy of the opinion being found upon page 19 of the record.

The evidence was all stipulated and the defenses raised were (1st) want of patentable novelty and invention, and (2d) noninfringement.

His Honor, Judge Bledsoe, held that there was no infringement of any claim of the reissue patent, whereupon the cause comes before your Honors for a final consideration of the matter.

THE CLAIMS OF THE REISSUE PATENT.

The first claim of the patent specifies that the label is "to be detachably fastened around a can, provided on its upper and lower edges with retaining flanges." This claim is manifestly not infringed by reason of the fact that the appellee's structure in no way embodies a can, and the remaining portion of the claim need not be therefore considered.

Claim 2 provides "a label adapted to be detachably secured around a container," and in the sense as used in the specification of the patent and as disclosed in the drawing, the chewing-gum product of Wm. Wrigley Jr. Company is not sold in any container. The carton in which twenty five-cent packages of chewing-gum are contained is known to the trade as a container, whereas a label or wrapper for holding five individual sticks of chewing-gum together cannot be rightfully said to be a container, and therefore it is thought that claim 2 cannot be urged to include the label in question.

Claim 3, however, specifies "a label adapted to be detachably secured around a package," and it is upon this claim that the appellant largely predicates his case. An examination of the Wrigley package shows (1st) that it has a label adapted to be detachably secured around a package; (2d) that said label has display matter relating to the contents of the package on its outer face; (3d) that the inner face of the label bears useful printed matter; and it remains for the decision of this court, if claim 3 is valid, to determine whether the Wrigley label has an element in its composition which meets the following described element of claim 3, to wit:

"Said label being provided on the outer face thereof with a line out of registry with said useful printed matter indicating where the label may be severed to remove the entire label without mutilating the printed matter on its inner face."

THE FILE HISTORIES OF THE ORIGINAL AND REISSUE PATENTS.

The file history of the original patent is printed, beginning upon page 33 of the record. The first four claims embodied in the application were all rejected by the Examiner on certain prior patents, whereupon three new claims were submitted and all again rejected as involving no invention over the prior art.

Two new claims were thereupon submitted which were rejected, resubmitted and again rejected as involving no invention, and finally a single claim

was submitted which after amendment was agreed upon by the Examiner and the solicitors to contain patentable novelty and therefore allowed. This claim appears in the original patent found following page 44 of the record and is only of consequence in that it could in no wise be said that the label of Wm. Wrigley Jr. Company was an infringement of this claim. The original patent was thereupon surrendered and a reissue application filed December 26, 1914.

This reissue application contained three new claims, claim 1 of which was limited to the application of a label to a can having retaining flanges, and allowed, whereas claims 2 and 3 were rejected on certain prior art patents. Thereupon amendment was made to all of the claims and in the next action claim 1 was allowed and claims 2 and 3 again rejected.

It is to be noted at this point that the amendment to these claims, found upon page 52 of the record, pertain to the location and character of the printed line on the label.

The Examiner thereupon stated as follows:

“On review, the claims are rejected as covering unpatentable combinations.”

New claims were thereupon submitted and after further argument and amendment the claims were allowed as now appearing in the reissue patent.

The references cited by the Examiner are found in the record immediately following page 58, and an examination of these prior art patents, in view

of the file history of the patent, must necessarily restrict and confine the invention of the Cole patent, if there is any invention, to its most minute and last detail.

WHAT IS THE INVENTION OF THE COLE
REISSUE PATENT IN SO FAR AS CLAIMS
2 OR 3 ARE CONCERNED?

There was no invention, of course, in detachably securing a label to a package as this is clearly shown in the prior art patents found in this record, nor was there any novelty in placing display matter relating to the contents of the package on the outer face of the label, as this was old and well-known practice. Furthermore, it was old in the art to print on the inner face of the label certain text or subject matter either in the form of directions or coupons, and lastly, it was old in the art to indicate or provide means on the label for severing it or a portion of it in order to save the label in its entirety or a part thereof, such as disclosed in patents No. 418,122 of December 24, 1889; No. 1,004,055 of September 26, 1911; No. 814,592 of March 6, 1906, as well as various other patents in the art, so that the question of novelty and invention would appear to center upon the word "severed" as found in both claims 2 and 3.

Now, "severing" does not mean "detaching," for in the prior patent No. 566,761 of September 1, 1896, there is a label shown which is adapted to be separated or detached from the container there shown, and it was in view of such patents as Martin, Braly, Schwab and Hosmer that the inventor was compelled

to abandon in his claims such a broad phrase as "means indicating where the wrapper may be *detached* from the package," and confine himself to the narrow restricted and specific limitation as found in the claims, namely, a complete severance or a physical cutting of the label at a designated point.

It, therefore, being old to print a coupon, directions, offers, or premium lists on the rear side of labels containing advertising matter on the front side, is there any invention in providing a label so marked or printed with a line on the outside indicating where the label may be severed for the purpose of saving the coupon on the reverse side?

Another salient limitation in both claims 2 and 3 is in claim 2 "a line disposed transversely thereto and out of registry with said useful printed matter," and in claim 3, "a line out of registry with said useful printed matter." The Court's attention is called to this limitation because there is a specific line in the Cole patent extending entirely across the label and indicating the precise point where the label must be severed, whereas in the appellee's label there is no line indicating where the label should be severed for the very good reason that a cutting or severance of the label as contemplated by the Cole patent is not intended in the appellee's label.

THE APPELLEE DOES NOT INFRINGE.

The packages of Spearmint chewing-gum introduced in evidence in this cause are all machine-wrapped, and this has been the practice among chewing-gum manufacturers for many years. The wrapping machines, after wrapping the individual

sticks of gum mechanically place five sticks in a bundle and apply a wax wrapper to the five sticks. What is known to the trade as a label or counterband is next applied to the five sticks of gum and a small quantity of glue or other adhesive material is applied to the outside of the label near one edge, so that when the other end of the label overlies the end upon which the adhesive material is deposited, the two ends of the label are thus gently secured together, leaving one edge of the label free whereby the label may be easily removed either for the purpose of saving the label or for facilitating its removal by the purchaser. For many years it has been the practice of Wm. Wrigley Jr. Company and its predecessors, Zeno Manufacturing Company, to lightly secure the ends of its labels or counterbands together for facilitating their removal. Evidence to this effect was stipulated, as appears upon page 25 of the record.

The separating of the two ends of the label is in no sense a severance of the label within the intent or spirit of the Cole patent. The removal of the Wrigley label is much the same as where two ends of a string are tied together and are separated by untying the knot. In no way could the untying of the knot be considered as a "severance" of the string. To sever implies a division, and a division means a separation into two or more parts. In the Cole patent the label is separated into two or more parts because when the label is cut along the line as indicated, what was before severance was one end of the label is now secured to the other end of the label, hence

the original label is separated into two parts; but in the Wrigley label there is no separation or division into two parts as the label, when its ends are separated, is still the same unit as it was when originally applied. For these very obvious and simple reasons it is submitted that the label of the appellee is in no wise severed, and hence there is no infringement of either claims 2 or 3 of the Cole patent.

Again, the Wrigley label is not provided with any specific line as called for in claims 2 and 3 indicating where it is to be severed. Counsel for appellant, on page 8 of his brief, is a little dubious as to where this line is on appellee's label, stating that it is either "the line formed by the free edge of defendant's label," or "the waved line" beneath the words "Remove Carefully," or "the straight line above said words." There is in this statement of counsel a clear intention of having claims 2 and 3 broadened beyond the scope of even the reissue patent which amounts practically to a reissue of the reissue. Bear in mind that the patentee attempted to obtain a claim of substantially the same scope which counsel is now attempting to have this Court place upon the claims in question, and that such a claim was flatly denied by the Patent Office in its rejection of January 2, 1915, found on page 49 of the record.

As appellee's label is not intended to be severed it necessarily follows that there is no reason for having a line indicating where it might be severed, and inasmuch as the line is absent and there is no proof that severance of the label is contemplated, it is submitted that there can be no infringement

of claims 2 and 3 where the only element of these claims which could possibly give life or patentable novelty to them is absent from appellee's structure.

CLAIMS 2 AND 3 INVALID FOR WANT OF PATENTABLE NOVELTY AND INVEN- TION.

It is thought that claims 2 and 3 of the patent are without any semblance of patentable novelty or invention in view of certain stipulated prior uses appearing in this record. Colgate & Company's label, Exhibit "L," contains every element of claims 2 and 3, assuming that a cake of soap is a "container" as defined in claim 2, or a "package" as defined in claim 3. This label is unquestionably intended to be detachably secured around a cake of soap. It has printed matter on one side, a coupon on the reverse side, and a prominent notice on the face of the label to cut the same along certain well defined lines in order to save the coupon on the reverse side. Babbitt's soap label, Exhibit "N," is of the same character, and this is true of the Procter & Gamble soap labels, Exhibits "O," "P" and "Q." From the soap label exhibits in this case it appears to have been common practice to have a coupon on the rear side of a label and with a notice on the front side where to cut the label so as not to destroy the coupon.

The best example, perhaps, of a prior use is in Defendant's Exhibit "K," Borden's Condensed Milk Co. label. This label is divided into three sections by gold division lines, the center section having a list of premium stores on the back side of the label

which is certainly "useful printed matter" within the meaning of the claims, and upon the left hand panel of the label is this notice: "Save Center Panel of this Label," entire front reading: "STAR BRAND CONDENSED MILK." The gold lines on either side of the word "Star" clearly indicate that portion of the label which should not be mutilated in case the label is removed, and it is thought that this label meets every element of both claims 2 and 3.

Unquestionably this label would be an infringement of claims 2 and 3 if not an anticipation, and applying the well-known rule that if a structure anticipates it will necessarily infringe a claim, it would seem certain that Exhibit "K" fully and clearly meets every element of claims 2 and 3, and hence these claims are invalid for want of patentable novelty and invention by reason of this admitted prior use.

THE LAW AS APPLICABLE TO THE FACTS IN THIS CASE.

It is difficult to see what the patentee Cole did in view of the prior art as disclosed in the history of the patent and the admitted prior uses of record. Under the heading of "Invention" in appellant's brief, it was thought that some light might be thrown on the question of where the invention resided in claims 2 and 3, but the discussion and references apply to other cases considered by the courts and in no wise appear to be applicable to this one. From the most advantageous viewpoint that counsel for appellee is able to analyze the invention, all that Cole did

was to bring certain extremely old and well-known elements together and not even produced a new combination or new results. The established rule of law was long ago laid down in *Hailes v. Van Wormer*, 20 Wall. 353:

“Merely bringing old devices into juxtaposition and there allowing each to work out its own effect without the production of something novel is not invention.”

In *Office Specialty Manufacturing Co. v. Fenton Metallic Manufacturing Co.*, 174 U. S., 492, the facts were much similar to the facts in the present case, because the Hoffman patent was merely an aggregation of prior well-known devices, and the Court so confined the claim that no infringement was found. In that case the Court said:

“Putting the Hoffman patent in its most favorable light, it is very little, if anything, more than an aggregation of prior well-known devices, each constituent of which aggregation performs its own appropriate function in the old way. Where a combination of old devices produces a new result such combination is doubtless patentable, but where the combination is not only of old elements, but of old results, and no new function is evolved from such combination, it falls within the rulings of this court in *Hailes v. Van Wormer*, 20 Wall. 353, 368; *Reckendorfer v. Faber*, 92 U. S. 347, 356; *Phillips v. Detroit*, 111 U. S. 604; *Brinkerhoff v. Aloe*, 146 U. S. 515, 517; *Palmer v. Corning*, 156 U. S.

342, 345; Richards v. Chase Elevator Co., 158 U. S. 299. Hoffman may have succeeded in producing a shelf more convenient and more salable than any which preceded it, but he has done it principally, if any wholly, by the exercise of mechanical skill.

CONCLUSIONS.

It is therefore respectfully submitted that claims 2 and 3 of the Cole patent are not infringed—

(1st) Because the appellee's construction has no line "out of registry with said useful printed matter indicating where said label should be severed," as specified in claims 2 and 3, and

(2d) Assuming that there is such a line on appellee's label, the said label is not designed nor is the same intended to be severed in the sense of the Cole patent, hence there is no infringement.

(3d) It is furthermore respectfully submitted that Exhibit "K" meets every element of claims 2 and 3 of the patent in suit, and hence these claims are invalid for want of patentable novelty and invention in view of this stipulated instance of prior use.

Respectfully submitted,
JAMES R. OFFIELD,
Solicitor and of Counsel for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit

FRED STEBLER,

Appellant

vs.

PORTERVILLE CITRUS ASSOCIA-
TION,

Appellee

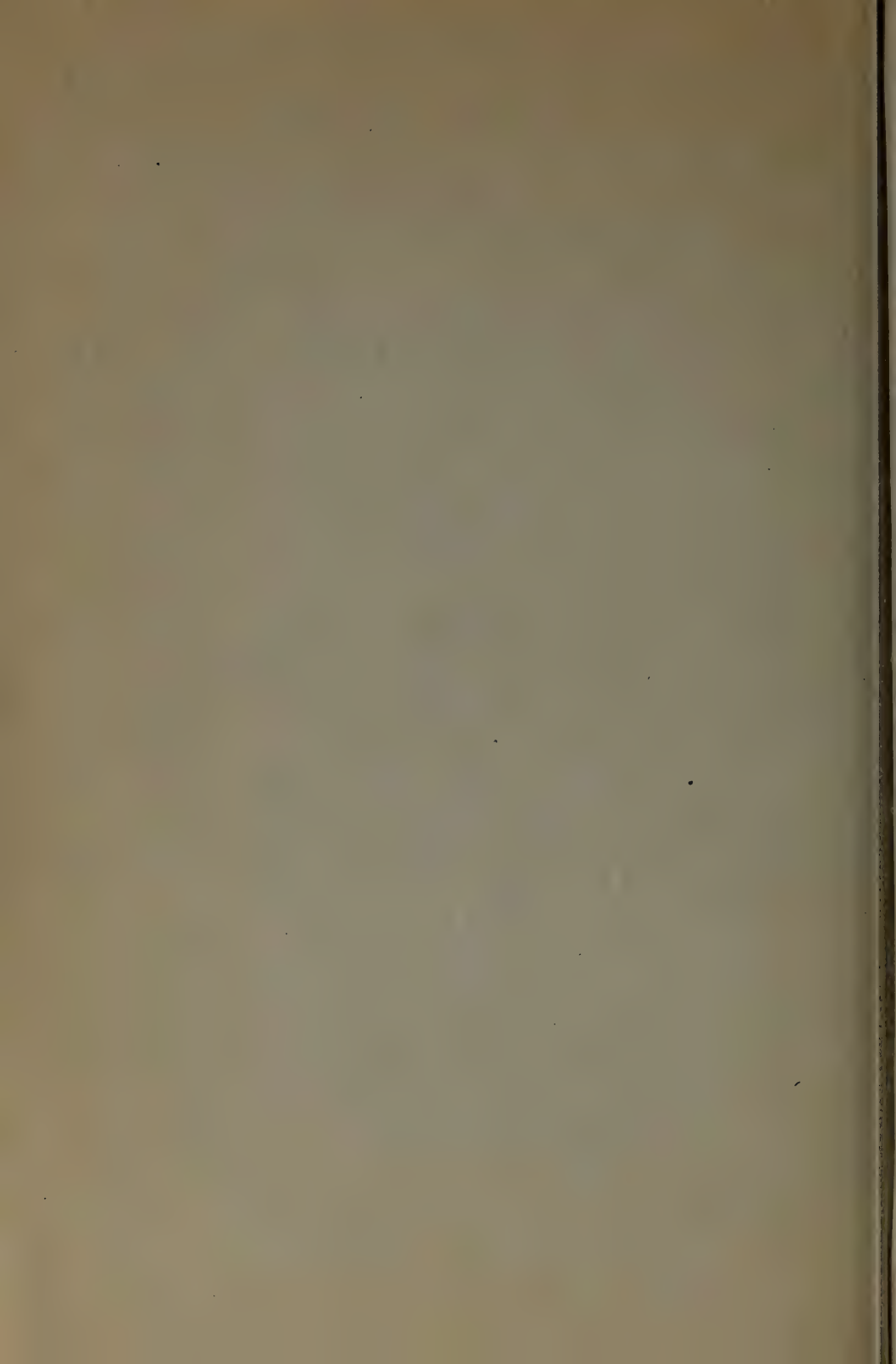
Transcript of Record

Upon Appeal from the United States District Court
for the Southern District of California,
Northern Division

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Clerk.



No. _____

United States
Circuit Court of Appeals
For the Ninth Circuit

FRED STEBLER,

Appellant

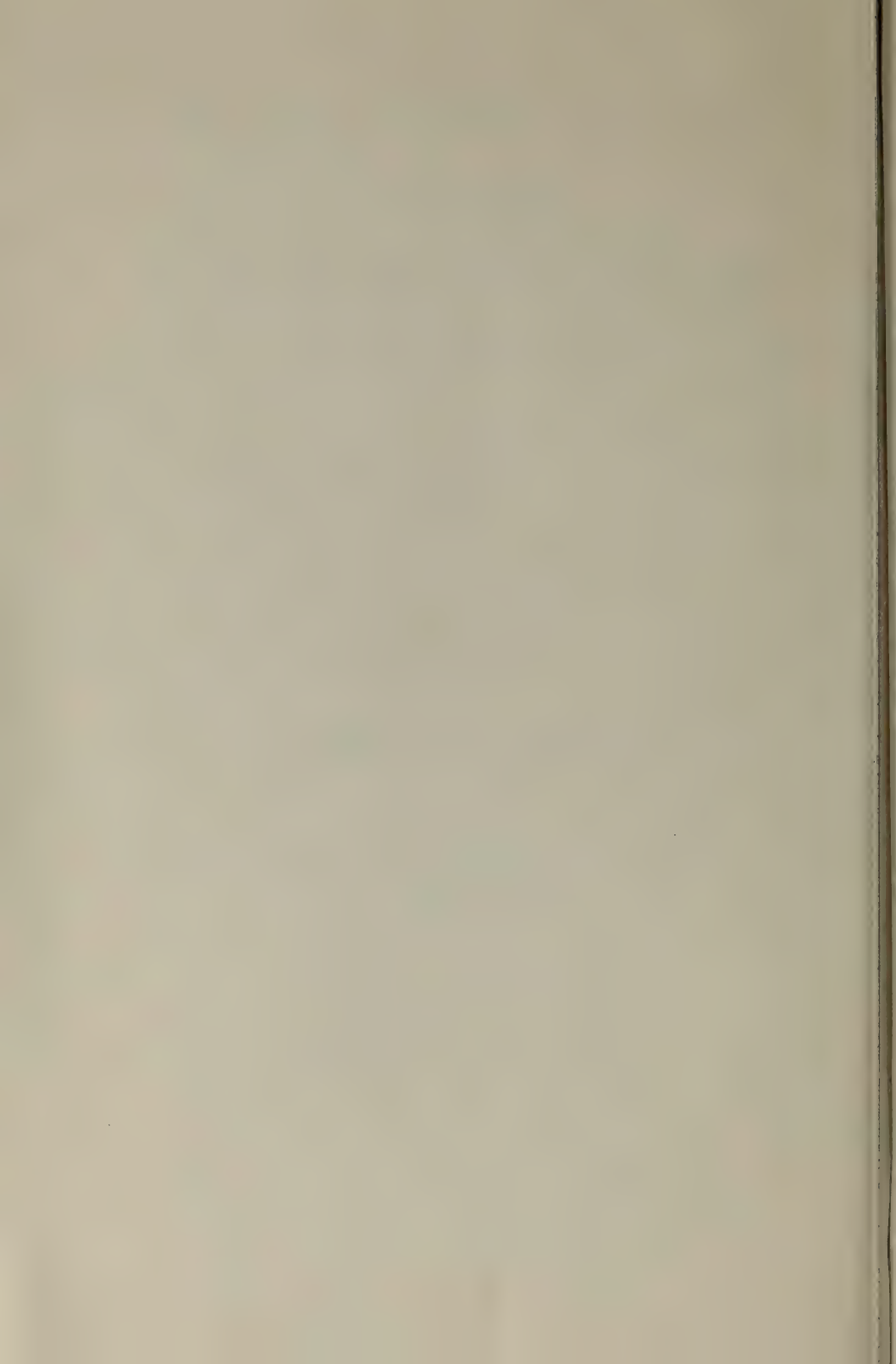
vs.

PORTERVILLE CITRUS ASSOCIA-
TION,

Appellee

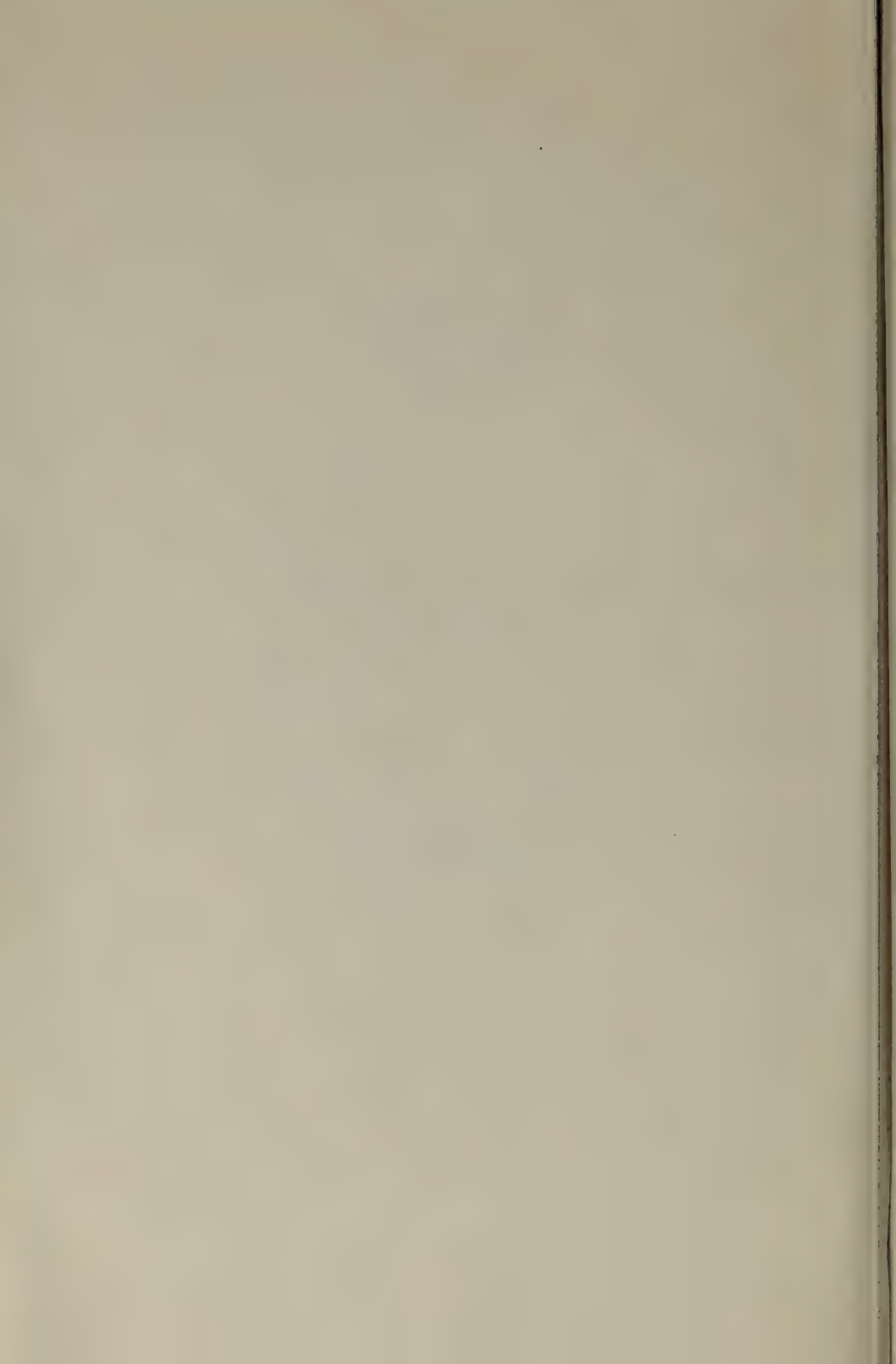
Transcript of Record

Upon Appeal from the United States District Court
for the Southern District of California,
Northern Division



INDEX

	Page
Answer	14
Assignment of Error	25
Bill of Complaint	7
Bond On Appeal	27
Decree	22
Minute Order	21
Order Allowing Appeal	24
Petition for Order Allowing Appeal	23



1

United States District Court, Southern District of California, Northern Division.

FRED STEBLER,

Plaintiff,

vs.

PORTERVILLE CITRUS ASSOCIATION,

Defendant.

2

IN EQUITY—BILL OF COMPLAINT

COMES NOW Fred Stebler, a resident and citizen of the city of Riverside, state of California, and for his Bill of Complaint against Porterville Citrus Association, defendant, alleges:

I.

3 That defendant is now and during all the times hereinafter mentioned was a corporation duly organized, created and existing under and by virtue of the laws of the State of California and has and had its principal place of business at Porterville, in the county of Tulare, state of California.

II.

That heretofore and prior to January 12, 1903, one Thomas Strain of Fullerton, California, was the original, first and sole inventor of a certain new and useful Fruit Grader. That on November 15, 1904, Letters Patent of the United States of America, numbered 775,015, were

- 4 duly and regularly granted, issued and delivered by the government of the United States of America to the said Thomas Strain for the said invention whereby there was granted and secured to the said Thomas Strain, his heirs, legal representatives and assigns, for the full term of seventeen (17) years from and after the 15th day of November, 1904, the full and exclusive right, liberty and privilege of making, using and vending to others to be used the said invention throughout the United States of America and the territories thereof. That said Letters
- 5 Patent were duly issued in due form of law under the seal of the United States Patent Office and duly signed by the Commissioner of Patents, all as will more fully and at large appear from the said original Letters Patent or a duly certified copy thereof ready in court to be produced as may be required.

III.

- That heretofore, to-wit: on March 15, 1912, the said
- 6 Thomas Strain, by an instrument in writing, duly executed by him, and by him delivered to one E. J. Marks, of Fullerton, California, duly assigned, transferred, and set over unto the said E. J. Marks, his heirs and assigns, the full and exclusive right, title and interest in and to the said invention and Letters Patent No. 775,015, together with all rights of action, claims, or demands of whatever nature arising out of or accruing therefrom, including all claims for past infringement thereon, which said assignment was duly recorded in the United States Patent Office on April 1st, 1912, in liber K-89, page 139

7 of Transfers of Patents, all as will more fully and at
large appear from said original assignment, or a duly
certified copy thereof, ready to be used in court as may
be required; that heretofore, to-wit: on March 15th,
1912, said E. J. Marks, by an instrument in writing, duly
executed by him, and by him delivered to one Fred Steb-
ler, of Riverside, California, duly assigned, transferred
and set over unto the said Fred Stebler, his heirs and
assigns, the full and exclusive right, title and interest
in and to the said invention and Letters Patent No. 775,-
8 015, together with all rights of action, claims, or de-
mands of whatever nature, arising out of, or accruing
therefrom, including all claims for past infringement
thereon, which said assignment was duly recorded in the
United States Patent Office on April 1st, 1912, in Liber
K-89, page 138 of Transfers of Patents. That ever since
said March 15, 1912, plaintiff has been and is now the
sole and exclusive owner of the said full and exclusive
right, title and interest in and to said Letters Patent and
9 all rights and privileges thereby granted and secured.

IV.

That said invention so set forth, described and
claimed in and by said Letters Patent No. 775,015 is of
great value and that since the grant, issuance and de-
livery of the said Letters Patent, the public, users and
manufacturers of such machinery, and the trade in gen-
eral, have acquiesced in and acknowledged the rights of
the said Thomas Strain and of plaintiff as the successor
in interest of the said Thomas Strain, in, under, and to

- 10 the said invention and Letters Patent, and the exclusive rights thereby granted and secured and have generally respected the same, and save and except for the infringement thereon by defendant, plaintiff and his predecessor in interest, Thomas Strain, have had and enjoyed the exclusive right, liberty and privileges since November 15th, 1904, of manufacturing, selling and using machines embodying and containing the said invention described in, set forth by, and claimed in said Letters Patent No. 775,015, and but for the wrongful and infringing acts of
- 11 defendant, plaintiff would now continue to enjoy the said exclusive rights and the same would be of great and incalculable benefit and advantage to plaintiff; that said defendant has been notified in writing of the grant, issuance and delivery of said Letters Patent and of the rights of plaintiff thereunder, and has had full knowledge of plaintiff's rights under said Letters Patent, and demand has been made upon defendant to respect said Letters Patent, and not to infringe thereon, but not-
- 12 withstanding such notice, defendant has continued to make, use and sell Fruit Graders embodying and containing said invention, and intends and threatens to continue so to do, unless restrained and prohibited by this court, that all Fruit Graders embodying said invention of said Letters Patent No. 775,015, manufactured or used or sold by plaintiff or his predecessor in interest, have been plainly marked in a conspicuous manner with the word "Patented" together with the day and date of issuance of said Letters Patent, to-wit: November 15, 1904.

13

V.

That notwithstanding the premises, but well knowing the same, without the license or consent of plaintiff and in infringement and violation of said Letters Patent, the defendant herein, Porterville Citrus Association, has, within the year last past, and in the Southern District of California, Northern Division, at the city of Porterville, state of California, contracted to be made and caused to be made, and is now using and intends to continue to

14 use and cause to be made, machines or Fruit Graders embodying, containing and embracing the said invention described in and claimed by said Letters Patent No. 775,-015 and has infringed upon the exclusive rights secured to plaintiff by virtue of said Letters Patent. That the said machines so contracted or caused to be made, are now being used by defendant and each contains the said patented invention; that defendant is, as plaintiff is informed and verily believes, realizing large profits, gains and advantages from the use of each of said infringing
15 machines, the exact amount of which profits is unknown to plaintiff, and plaintiff prays discovery thereof; that by reason of the said infringement plaintiff is suffering great and irreparable damage and injury.

To the end therefore that the said defendant, Porterville Citrus Association may, if it can, show why plaintiff should not have the relief herein prayed and to the best and utmost of its knowledge, information and belief, full true and direct and perfect answer make to all and singular the premises, matters and things here-

- 16 inbefore set forth and alleged, plaintiff prays that defendant, its officers, attorneys, agents, servants, employes, workmen and associates, each and every thereof, be restrained both provisionally and perpetually from further infringing upon said Letters Patent and from making, using or selling or causing to be made, used or sold any Fruit Grader capable of being used in infringement of the said Letters Patent and that defendant be decreed to account for and pay over to plaintiff all gains and profits realized by it from and by reason of the infringement aforesaid and be decreed to account for and pay unto plaintiff the damages suffered by plaintiff by reason of said infringement, together with the costs of this suit, and for such further, other or different relief as equity and good conscience shall require.
- 17

FRED STEBLER,
FREDERICK S. LYON,
Solicitor and of Counsel for Plaintiff.

- 18 STATE OF CALIFORNIA, }
County of Riverside, } ss.

FRED STEBLER, being first duly sworn, on oath says: that he is the plaintiff named in the foregoing Bill of Complaint; that he has read said Bill of Complaint and knows the contents thereof and the same is true of his own knowledge, except as to such matters stated on information and belief and as to such matters he believes the same to be true.

(Notarial Seal)

FRED STEBLER.

19 Subscribed and sworn to before me this 11th day of
February, 1916.

M. J. TWOGOOD,
*Notary Public in and for the County of Riverside, State
of California.*

20

21

22 *In The United States District Court, Southern District
of California, Northern Division.*

FRED STEBLER,

Plaintiff,

vs.

PORTERVILLE CITRUS ASSOCIATION,

Defendant.

In Equity

No. A.50

23

DEFENDANT'S ANSWER TO PLAINTIFF'S BILL
OF COMPLAINT

24

Now comes the defendant to the above-entitled suit and for answer to the Bill of Complaint on file herein, and more particularly to Paragraph 1 thereof, admits that it is a corporation duly organized, created and existing under and by virtue of the laws of the State of California and has its principal place of business at Porterville in the County of Tulare, State of California.

Answering Paragraph II of the Bill of Complaint defendant denies that on or prior to the 12th day of January, 1903, or at any other time, Thomas Strain, referred to in said paragraph, was the original, first and sole inventor of a certain new and useful FRUIT GRADER; denies that on November 15, 1904, or at any other time, Letters Patent of the United States of America, No. 775,015, were duly and regularly granted, issued and delivered by the government of the United

- 25 States of America to the said Thomas Strain for said alleged invention; denies that there was granted by said alleged Letters Patent, and secured thereby to the said Thomas Strain, his heirs, legal representatives and assigns for the full term of seventeen years, or for any other period from and after the 15th day of November, 1904, the full and exclusive right, liberty and privilege of making, using and vending to others to be used, said alleged invention throughout the United States of America and the territories thereof; denies that the said
- 26 Letters Patent were duly issued in due form of law under the seal of the United States Patent Office and duly signed by the Commissioner of Patents.

Answering Paragraph III of the said Bill of Complaint, defendant says that it is without knowledge as to the facts, or any of them, alleged in said Paragraph III and, therefore, and on that ground, denies the same and demands that plaintiff make strict proof thereof.

- Answering Paragraph IV of the said Bill of Com-
- 27 plaint, defendant denies that the alleged invention set forth, described and claimed in and by said alleged Letters Patent No. 775,015, is of great value, or of any value whatsoever; denies that since the grant, issuance and delivery of the said alleged Letters Patent, the public users and manufacturers of such machine, and the trade in general have acquiesced in and acknowledged the rights of the said Thomas Strain and of the plaintiff herein as the successor in interest of the said Thomas Strain, in, under and to the said alleged invention of the said alleged Letters Patent in suit herein; denies that any rights,

28 exclusive or otherwise, claimed to have been granted
and secured to the plaintiff herein, have been generally
respected and acquiesced in by the public; denies that
save and except for the alleged infringement thereon
by the defendant herein, the plaintiff and his predeces-
sors in interest have had and enjoyed the exclusive
rights, or any rights, liberties and privileges, since No-
vember 15, 1904, of manufacturing, selling and using
machines embodying and containing the said alleged
invention described in, set forth by and claimed in said
29 alleged Letters Patent No. 775,015; denies that but for
the alleged wrongful and alleged infringing acts of this
defendant, that the plaintiff herein would now continue
to enjoy any alleged exclusive rights, or any rights
whatsoever, under the alleged invention of the said al-
leged Letters Patent in suit; denies that any such al-
leged rights would be of great and incalculable benefit
and advantage to the plaintiff herein, or of any advant-
age or benefit whatsoever; denies that it has been noti-
30 fied in writing of the grant, issuance and delivery of
said alleged Letters Patent and of the said alleged rights
of the plaintiff herein thereunder; denies that it has
had full knowledge of plaintiff's alleged rights under
said alleged Letters Patent; denies that demand has been
made upon defendant to respect said Letters Patent and
not to infringe thereon; denies that notwithstanding any
such alleged notice, it has continued to make, use and
sell FRUIT GRADERS embodying and containing said
alleged invention; denies that it intends and threatens
to continue so to do and that it will continue so to do

31 unless restrained and prohibited by this court; denies that each and every FRUIT GRADER embodying the said alleged invention of said alleged Letters Patent No. 775,015, manufactured, or used, or sold by the plaintiff herein; or his predecessor in interest, have been plainly marked in a conspicuous manner, or in any manner whatsoever, with the word "PATENTED," together with the day and date of the issuance of the said alleged Letters Patent, to-wit, November 15, 1904.

32 Answering Paragraph V of the said Bill of Complaint, defendant denies that, without the license or consent of the plaintiff and in infringement and violation of said alleged Letters Patent, it has, within the last year, or within any time whatsoever, within the Southern District of California, Northern Division thereof, and at the City of Porterville, State of California, or at any other place or places, contracted to be made and caused to be made, and is now using and intends to continue to use and cause to be made, machines
32 or FRUIT GRADERS embodying, containing and embracing the said alleged invention described and claimed in and by said alleged Letters Patent No. 775,015, or that it has infringed upon the exclusive alleged rights, or any rights whatsoever, secured to plaintiff by virtue of said alleged Letters Patent; denies that the machines which it has contracted for or caused to be made, or which it is now using, contain the said alleged patented invention; denies that it has realized large profits or any profits, gains and advantages from the use of the said alleged infringing machines; and denies that by

34 reason of any alleged act of infringement complained of, the plaintiff is suffering or has suffered, great and irreparable damage and injury or any damage and injury.

And for a further and separate defense, defendant avers that the said Thomas Strain, mentioned in the patent in suit as the original, first and sole inventor of the thing patented, or attempted to be patented in and by said Letters Patent, was not such original, first and sole inventor, or any inventor thereof, but on the contrary, before the alleged invention or discovery thereof
 35 and for more than two years prior to his application for said Letters Patent, the thing patented or attempted to be patented in and by said Letters Patent, had been patented and described in various and sundry Letters Patent issued by the government of the United States to the following named persons on the following named dates and bearing the following names numbers:

	Name of Patentee	Date of Patent	No. of Patent
36	D. A. & A. B. Banker	February 10, 1874	147303
	W. O. Gunckel	August 7, 1883	282719
	Alfred Ayer	May 31, 1887	363974
	J. A. Jones	June 10, 1890	430031
	H. H. Hutchins	July 14, 1891	456092
	J. T. Ish	August 25, 1891	458422
	H. H. Hutchins	December 29, 1891	465856
	W. P. & H. Rice	August 31, 1897	589141
	M. P. Richards	July 24, 1900	654281
	H. B. Stevens	September 20, 1881	247428

37 A. Cerruti	February	26, 1895	534783
C. D. Nelson	November	11, 1902	713484

And for a further and separate defense defendant denies that the said Thomas Strain was the original, first and sole inventor, or any inventor at all, of the thing sought to be patented in and by said alleged Letters Patent No. 775,015, or any material or substantial part thereof; and in this connection states that long prior to the supposed invention or discovery thereof by the said Thomas Strain, the same was known to and used by the following persons and corporations, viz: Howard B. Stevens, M. A. Rice, R. C. Douglas, J. C. Greener, A. S. Kells, H. M. Eichelberger, A. S. Lambert and J. W. Hagins, each of Citra, County of Marion, State of Florida; Thorndyke C. Jameson of Corona, County of Riverside, State of California; F. E. Proud of La Habra, State of California; used in the packing house of W. H. Jameson situated at Corona, County of Riverside, State of California; used in the packing house of M. A. Rice, situated at Citra in the County of Marion, State of Florida; and was known to various other persons and corporations whose names and addresses are at this time unknown to this defendant and cannot be stated at this time; but defendant prays leave of the Court to amend this answer by specifying the names of such parties as soon as the defendant ascertains the same.

And for a further and separate defense, defendant avers, upon its information and belief, that the Letters Patent in suit are wholly void and of no effect for the

40 reason that the state of the art existing at the time of the
alleged invention thereof by the said Thomas Strain was
such that it required only the exercise of mechanical skill
in producing the device purporting to be patented in and
by the alleged Letters Patent in suit, and that the pro-
duction of the same did not require the exercise of the
inventive faculty.

WHEREFORE, defendant having fully answered
the Bill of Complaint, prays to be dismissed with its
41 costs in this behalf most wrongfully sustained.

(Signed) PORTERVILLE CITRUS
ASSOCIATION

N. A. ACKER,
Attorney and Counsel for Defendant.

STATE OF CALIFORNIA, }
County of Tulare. } ss.

42 John A. Milligan, being first duly sworn on oath
says: That he is the Secretary of the defendant corpor-
ation in the above-entitled suit; that he has read the
foregoing answer to the plaintiff's Bill of Complaint
herein; that the same is true of his own knowledge
except as to such matters and things as are therein stated
on information and belief, and that as to the latter he
believes the same to be true.

(Signed) JOHN A. MILLIGAN.

Subscribed and sworn to before me this 4th day of
March, 1916.

43

(Signed) J. F. WRIGHT,

Notary Public in and for the County of Tulare,

(Seal)

State of California.

At a stated term, to-wit: the July Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the Court Room thereof, in the City of Los Angeles, on Tuesday, the eleventh day of July, in the year of our Lord One Thousand Nine Hundred and Sixteen;

44

Present—The Honorable Oscar A. Trippet, District Judge.

FRED STEBLER,

Complainant,

vs.

PORTERVILLE CITRUS ASSOCIATION,

Defendant.

No. A 50

Equity.

45

This cause coming on this day for final hearing in open court, pursuant to stipulation of the parties and order heretofore entered herein; Frederick S. Lyon, Esq., appearing as counsel for complainant; N. A. Acker, Esq., appearing as counsel for defendant; A. S. Custer being present as shorthand reporter of proceedings, and acting as such; thereupon on motion and by consent, it is ordered that this cause be, and hereby is combined for final hearing with cause No. A 44 Equity, between the same parties.

46 *United States District Court, Southern District of California, Northern Division.*

FRED STEBLER,

Plaintiff,

vs.

PORTERVILLE CITRUS ASSOCIATION,

Defendant

In Equity

No. A-50

47

DECREE

The above entitled suit, having come on regularly for hearing upon the evidence and proofs educed on behalf of the respective parties, Frederick S. Lyon, Esq., appearing on behalf of Plaintiff and N. A. Acker, Esq., on behalf of Defendant, now upon due consideration thereof, it is

ORDERED, ADJUDGED AND DECREED,

48

That Plaintiff's Bill of Complaint be and the same is hereby dismissed, and that defendant have and recover judgment against plaintiff for the sum of \$137.53, its costs and disbursements herein.

Dated Los Angeles, California, November 20, 1916.

TRIPPET

District Judge.

Decree entered and recorded November 20, 1916.

WM. M. VAN DYKE, *Clerk.*

By CHAS. N. WILLIAMS

Deputy Clerk

49 *United States District Court, Southern District of California, Northern Division.*

FRED STEBLER,

Plaintiff,

vs.

PORTERVILLE CITRUS ASSOCIATION,

Defendant.

In Equity

No. A-50

50

PETITION FOR APPEAL

51 The plaintiff in the above entitled suit, conceiving himself aggrieved by the final decree made and entered by said Court in the above entitled suit on November 20th, 1916, dismissing plaintiff's Bill of Complaint, comes now by Frederick S. Lyon, Esq., his solicitor, and petitions said Court for an order allowing plaintiff an appeal from said decree to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also for an Order fixing the sum of security which plaintiff shall give and furnish upon such appeal.

FREDERICK S. LYON,

Solicitor for Plaintiff.

52 *United States District Court, Southern District of California, Northern Division.*

FRED STEBLER,

Plaintiff,

vs.

PORTERVILLE CITRUS ASSOCIATION,

Defendant.

In Equity

No. A-50

53 In the above entitled suit, the plaintiff having filed his petition for an order allowing an appeal from the decree in this Court made and entered in this suit on Nov. 20th, 1916, dismissing plaintiff's Bill of Complaint, and having filed his Assignments of Error;

Now on motion of Frederick S. Lyon, Esq., Solicitor for Plaintiff, it is ordered that said appeal be and hereby is allowed to plaintiff to the United States Circuit Court of Appeals for the Ninth Circuit from the said
54 decree dismissing plaintiff's Bill of Complaint, and that the amount of plaintiff's bond on said appeal be and the same is hereby fixed in the sum of \$250.00.

It is further ordered that upon the filing of such security a certified transcript of the record and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit in accordance with the statutes and equity rules of the Supreme Court of the United States.

Dated May 4, 1917.

OSCAR A. TRIPPET,

District Judge.

55 *United States District Court, Southern District of California, Northern Division.*

FRED STEBLER,

Plaintiff.

vs.

PORTERVILLE CITRUS ASSOCIATION,

Defendant.

No. A-50

56

ASSIGNMENTS OF ERROR

Comes now plaintiff above named, and specifies and assigns the following as the errors upon which he will rely on his appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree of November 20th, 1916, dismissing plaintiff's Bill of Complaint.

1. Error in not adjudging and decreeing that Thomas Strain was the original, first and sole inventor of the Fruit Grader described and claimed in Letters Patent No. 775,015, and that said Letters Patent are good and valid in law and plaintiff the owner thereof.

2. Error in not adjudging and decreeing that claims 1, 5, 7, 8, 9, 10, 11, 12, 13, 16, 18, 19, 24, 26, 31, 36 and 37 of Letters Patent No. 775,015 are and each of them is good and valid in law, and that the combined fruit graders and distributing apparatus used by defendant in its packing house at Porterville, California is an infringement of said claims and each thereof.

58 3. Error in not adjudging and decreeing that defendant be enjoined and restrained as in and by said Bill of Complaint prayed.

4. Error in not adjudging and decreeing that defendant account to and pay over to plaintiff the profits, gains and advantages received by or accruing to it from the use of said infringing machines.

59 5. Error in not adjudging and decreeing that plaintiff have judgment against defendant for plaintiff's damages arising from the use of said infringing machines by defendant.

6. Error in adjudging that defendant recover its costs and disbursements herein.

7. Error in not adjudging and decreeing that plaintiff have and recover of defendant his costs and disbursements herein.

In order that the foregoing assignments of error may be and appear of record, plaintiff presents the same to the Court and prays that such disposition may be
60 made thereof as is in accordance with the laws of the United States.

Wherefore said plaintiff prays that the decree in this suit made and entered on November 20th, 1916 be reversed and that the said Court be directed to enter an order setting aside said decree and ordering, adjudging and decreeing to plaintiff the relief against defendant prayed in said Bill of Complaint.

All of which is respectfully submitted.

FREDERICK S. LYON,

Solicitor for Plaintiff.

61 *United States District Court, Southern District of California, Northern Division.*

FRED STEBLER,

Plaintiff,

vs.

PORTERVILLE CITRUS ASSOCIATION,

Defendant.

In Equity

No. A-50

62

BOND ON APPEAL.

63 KNOW ALL MEN BY THESE PRESENTS, that Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Porterville Citrus Association, defendant in the above entitled suit, in the penal sum of Two Hundred and Fifty Dollars (\$250), to be paid to the said Porterville Citrus Association, its successors and assigns, for which payment, well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

Sealed with corporate seal and dated this 4th day of May, 1917.

The condition of the above obligation is such that whereas the said Fred Stebler, plaintiff in the above-entitled suit, is about to take an appeal to the United

64 States Circuit Court of Appeals for the Ninth Circuit, to reverse an order or decree made, rendered and entered on the 20th day of November, 1916, by the District Court of the United States, for the Southern District of California, Southern Division, in the above-entitled cause dismissing plaintiff's Bill of Complaint in said cause as in said decree set forth.

65 NOW, THEREFORE, the condition of the above obligations is such that if Fred Stebler shall prosecute his said appeal to effect and answer all costs which may be adjudged against him if he fail to make good his appeal, then this obligation shall be void; otherwise to remain in full force and effect.

FIDELITY AND DEPOSIT CO. OF MARYLAND.

By W. M. WALKER,

Attorney-in fact.

Attest A. W. FRANCISCO,

Agent.

66 STATE OF CALIFORNIA, }
County of Los Angeles, }^{ss.}

On this 4th day of May, 1917, before me, C. M. Evarts, a Notary Public in and for said county of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared W. M. Walker, known to me to be the attorney in Fact, and A. W. Francisco, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fi-

67 delity and Deposit Company of Maryland thereto and their own names as attorney in Fact and Agent respectively.

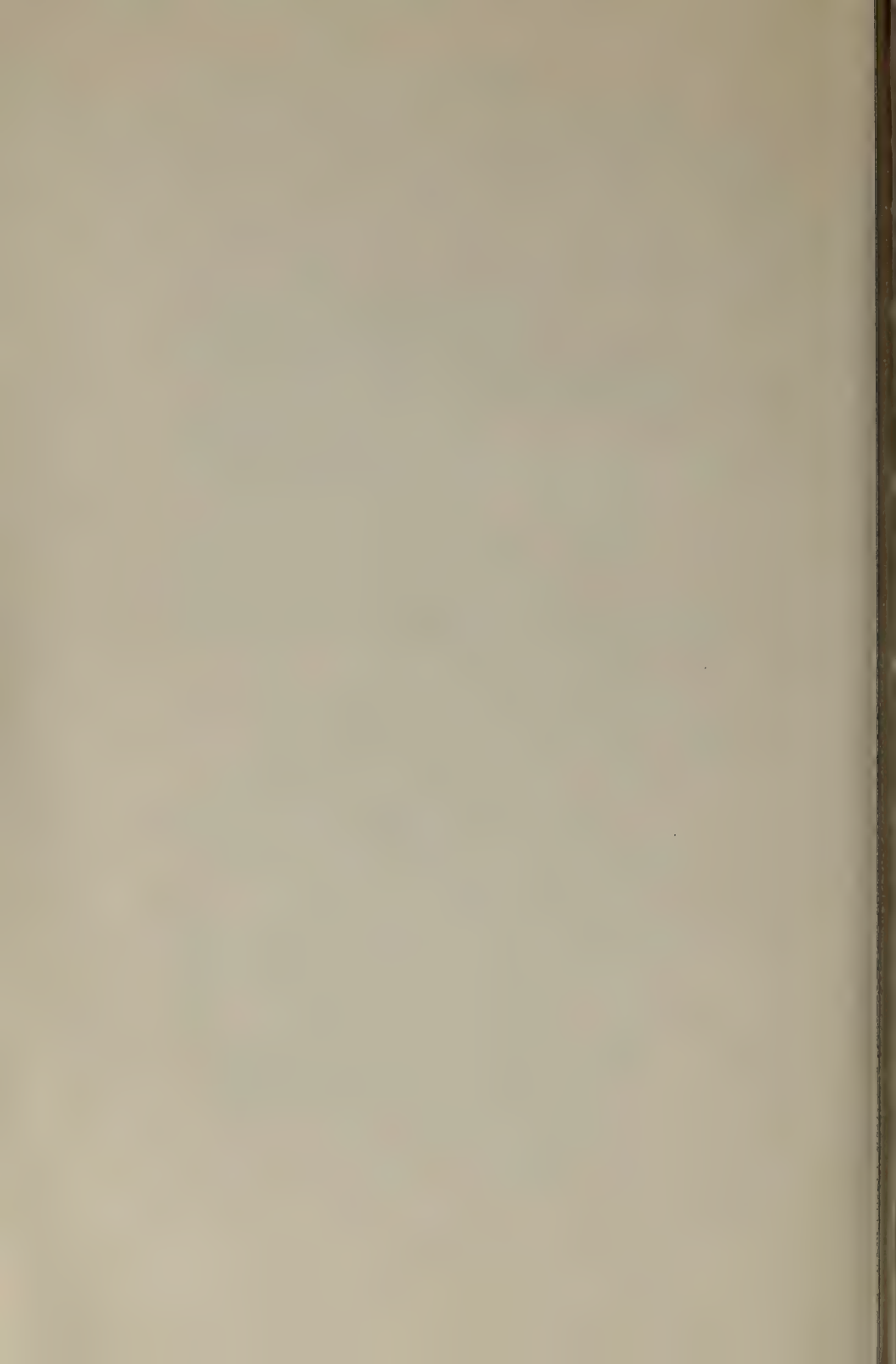
C. M. EVARTS,
*Notary Public in and for the County of Los Angeles,
State of California.*

The within bond and surety thereon is hereby approved this May 4, 1917.

TRIPPET,
District Judge.

68

69



No. 3052.

United States
Circuit Court of Appeals, 9
FOR THE NINTH CIRCUIT.

Fred Stebler,

Appellant,

vs.

Porterville Citrus Association,

Appellee.

APPELLANT'S BRIEF.

FREDERICK S. LYON,

504 Merchants Trust Bldg., Los Angeles, Cal.,

Solicitor for Appellant.



No. 3052.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Fred Stebler,

Appellant,

vs.

Porterville Citrus Association,

Appellee.

APPELLANT'S BRIEF.

This case comes before this court upon an appeal by Fred Stebler, complainant in the court below, from a final decree in a suit in equity dismissing his bill of complaint against the defendant and appellee, Porterville Citrus Association. The suit is one for infringement of letters patent No. 775,015 granted November 15th, 1904, to Thomas Strain.

For convenience the parties will be herein referred to as complainant and defendant.

The title of complainant to the patent in suit was stipulated. The machines involved and charged to infringe the Thomas Strain patent are the same machines which are involved in the suit in this court entitled Porterville Citrus Association, Appellant, v. Fred Stebler, Appellee, No. 2960, and this appeal is heard upon the short transcript of record printed herein (containing simply the pleadings, the decree, the minute order of the District Court that this suit "be and hereby is combined for final hearing with cause A 44, Equity, between the same parties" the assignments of error and appeal papers) and the transcript of record of the trial of the combined causes certified to this court and filed as the transcript of record on said appeal No. 2960. References in this brief to the transcript of record will therefore refer to the record in appeal No. 2960.

The Thomas Strain patent discloses three inventions, all applicable to fruit graders. It is with *two* only of these that appellant's appeal deals.

The Thomas Strain patent discloses, describes and claims a preferred embodiment of each of these three inventions.

The first of these three inventions is a means of grading fruit wherein the roller side of the gradeway is adjusted. With this invention appellant's appeal does not deal.

The second invention described in the Strain patent is directed to means for delivering the graded fruit to suitable bins and distributing throughout the length of the *fixed* bin spaces the graded fruit so as to utilize

the whole of such bin space. This feature is charged to be infringed.

The third invention disclosed in the Strain patent is the grading element composed of the alternate Strain invention, which consists in providing a grader element composed of a rotating wall and a suitably supported belt by which the fruit runway is formed and adjusting means by which the belt may be adjusted at predetermined points toward or away from the belt to provide the grade openings or discharge openings for the various sizes or grades of fruit. This Strain invention is charged to be infringed by the defendant's machines.

So far as the second of these inventions is concerned, to-wit, that which may be termed the fruit distribution feature,—this patent has been fully considered in the briefs filed on appeal No. 2960. The object of this Strain invention is set forth in the Strain patent as follows:

“To provide means whereby the fruit will be thoroughly mixed or delivered into each bin in such a way that the several sizes of fruit in each bin are perfectly distributed. This is a valuable feature, for the reason that although the average size of fruit in different bins will vary, still the actual size of fruit delivered into each bin will also vary somewhat.” [Transcript Record, page 528, lines 13 to 21.]

The means thus referred to by Mr. Strain comprise the lower portion of the inclined belt 10 and the brackets 36a and deflector 36b in conjunction with the fixed and non-adjustable bins.

It is to be noted that in the drawings of the Strain patent there is shown a double or two-runway grader. That is to say, each side of the machine is complete in itself for the operation of grading and distributing to bins the fruit. In this respect defendant's machines are the same, as they are each provided with two grade-ways, distributing belts for each grade-way, and a series of bins for each grade-way. In the Strain patent his preferred embodiment of this feature of the invention is described in connection with the lower or inclined part of the belt 10 as follows:

"36a represents brackets attached to the edges of the leaves. Mounted on each bracket is an inclined deflector 36b. The deflector 36b is provided with a lug 36c, and the latter is adjustably mounted on the bracket 36a and clamped thereto by means of a set screw 36d. The deflector 36b may be placed at any desired point along the bracket 36a, so that fruit will be shunted into the bin at any desired point. This allows the fruit to be delivered into the bin in such a way that it is thoroughly mixed. If the fruit were delivered into the bin direct from under the grading-rods, the size of fruit in the bin at one extreme side would be larger than the size at the other side. To obviate this difficulty, I employ the guards 36 and deflector 36b, by means of which the fruit is thoroughly mixed in the bin, and no particular size occupies a particular place in the bin, as would be the case were the guards and deflectors not employed." [Transcript Record, page 529, lines 65 to 85; page 2 of the specification of the Strain patent.]

Of this Thomas Strain invention the explanation thereof by defendant in its brief, on appeal No. 2960, is directly in point. We quote from appellant's brief on appeal No. 2960 the following explanation of this second Thomas Strain invention:

"We find the apparatus therein disclosed to be for a fruit grader, and the embodiment of the invention, as therein disclosed, is a fruit grader having a fruit runway, formed of two parallel members, one member thereof constituting the rotary grading element of the apparatus, and which grading element is designated by the reference numeral 20 in the drawings of the letters patent, and is more clearly shown by reference to Figs. 3, 4, 5, 7 and 9 of said drawings. Beneath this member and extended to one side thereof is arranged a longitudinally traveling conveyor belt or carrier 10, onto which the sized fruit escaping from the discharge outlets of the grader moves by gravity, the said carrier moving longitudinally over the downwardly inclined sections of the supporting bed of the apparatus. Alongside of the downwardly inclined bed portion of the apparatus is situated a series of longitudinally disposed fruit receiving bins into which the sized fruit is received, these bins being co-extensive with the length of the grading apparatus. The sized fruit, unless otherwise obstructed, flows by gravity from the outlet aperture for the sized fruit, transversely of the longitudinally traveling belt or conveyor into the bins located for the reception thereof. However, there is associated with the longitudinally traveling carrier of the said apparatus a plurality of barriers or arresting members 36, which are arranged parallel with the endless

traveling belt or carrier 10, and associated with each of said barrier members 36 is a longitudinally adjustable barrier member 36-B. These two members co-acting form a chute or runway, the member 36 serving to arrest the downward gravity flow travel of the sized fruit transverse of the carrier and change its direction of travel to a direction parallel with the endless moving carrier belt 10, the associated longitudinally disposed adjustable barrier member 36-B serving the purpose of deflecting the fruit from the traveling belt or carrier into the bins at any desired point throughout the length thereof. Inasmuch as these co-acting members 36 and 36-B are arranged longitudinally of the grading apparatus and parallel with the endless traveling belt or carrier 10, they form throughout the length of the apparatus a series of chutes for guiding the sized fruit and directing the same to any desired discharge point relative to the fruit receiving bins. With the Thomas Strain apparatus, it is the members 36 with its associated longitudinally adjustable members 36-A which form the chutes for directing the sized fruit relative to any particular or desired portion of the fruit receiving bins." (Brief of appellant Porterville Citrus Association, case 2960, pages 28 and 29.)

In the foregoing there are two errors. The belt 10 of the Thomas Strain patent is not a separate belt or a conveyor belt *per se*, but the lower side of the grading belt 10 is used as a conveyor and the barrier members 36 and 36b arranged along the lower side of such grading belt. The second error is defendant's statement that the barrier member 36b serves the purpose

of deflecting the fruit from this belt into bins "at any desired point throughout the length thereof." This language is in error if read in the sense that the bin space is adjustable or that the Thomas Strain conception in any manner contemplated adjustability of the bins or the carrying of a given grade or size of fruit from one grading outlet or opening over and beyond the bin arranged opposite such outlet and to a succeeding bin or bins. This result cannot be secured with the Strain invention.

On page 31 of the same brief the Porterville Citrus Association says:

"In the Thomas Strain patent the means which control the discharge of the fruit relative to any given position of the fruit receiving bins, is the longitudinally adjustable member 36-B, which co-operates with its associated member 36, to form a guide chute. The member 36 is a fixed barrier arranged to arrest the downward gravity flow of the fruit from the sizing outlets of the grader or sizer toward the fruit receiving bins, while the associated member 36-B serves to act as a longitudinally adjustable barrier for controlling the discharge point of the sized fruit from the longitudinally movable carrier relative to the fruit receiving bins. The purpose of such longitudinally adjustable barriers being to evenly distribute the fruit within the bins."

The Porterville Association's brief, then quoting lines 13-31 of page 1 of the specification of the Thomas Strain patent and lines 65-85 of page 2 of the Strain patent specification, and said brief (page 32) continues as follows:

“By means of these longitudinally adjustable deflectors or barriers, the point of discharge for the sized fruit relative to the bins is under the absolute control of the operator, so that the fruit is not only evenly distributed within the bins, but, equally so, the fruit is prevented from pyramiding at any portion of the bin.”

After thus discussing the construction and inter-relation of the parts of the drawings and description of the Thomas Strain patent said brief on behalf of the Porterville Association quotes certain testimony of witnesses in its behalf respecting this Thomas Strain machine, and then proceeds:

“We particularly direct attention to this testimony, for the reason that the function given for the member 36-B of the Thomas Strain patent is *the function and only function of the longitudinally adjustable barriers of the appellants’ machine.*” (Appellant’s Brief in 2960, page 38.)

On page 80 of the Porterville Association’s said brief on said appeal No. 2960 it is stated:

“In the appellants’ machine a return is made to the utilization of a longitudinally movable barrier for controlling the discharge of the fruit from the longitudinal conveyor relative to any given point within the fruit bin situated for the reception of such sized fruit, *the same being a return to the Thomas Strain patent* and utilization of a simpler type of longitudinally adjustable barrier to that shown by the element 36-B of the said Strain patent. The difference between appellants’ longitudinally movable barrier and the longitudinally movable barrier 36-B of the Thomas Strain patent,

residing in provision being made whereby under normal working of the apparatus the said barrier is not employed; whereas, in the device of the Thomas Strain patent the longitudinally adjustable barrier 36-B is attached to and forms a permanent portion of the apparatus. In fact, *the longitudinally adjustable barrier of appellants' machine performs a function corresponding to that of the longitudinally adjustable member 36-B of the Thomas Strain patent.* This we not only ascertain from a reading of the Thomas Strain patent, and the knowledge of the operation of the barrier member of appellants' machine, but are so told by the testimony of Thomas Strain, Sr. [Record, p. 424]; by the testimony of witness Ofstadt [Record p. 385-386]; by the testimony of witness Thomas Strain, Sr. [Record p. 320]; by the testimony of witness Milligen [Record p. 305]; by the testimony of witness Brookhart [Record, page 336]: and further by the testimony of appellee's expert witness, Knight, which testimony is as follows:

“‘Q. (By Mr. Acker): And the part 36 then serves as a longitudinally disposed barrier for arresting the transverse movement of the fruit as it flows from the grading rod toward the fruit receiving bin, is that correct?

‘A. Yes.

‘Q. And to that extent it serves the same purpose, does it not, as the barrier employed in the defendants' device for arresting the line of travel of the fruit flowing by gravity from the sizing member towards the fruit receiving bin?

‘A. Yes.

‘Q. Now, what purpose does the part marked 36-B in the device of the Thomas Strain patent of Defendants' Exhibit Number 3 serve?

‘A. It determines the particular point at which the fruit will be deflected from the depression in the conveyor and discharge into the bin.

‘Q. That member 36-B is longitudinally adjustable relative to the longitudinal traveling carrier member, is it not, Mr. Knight?

‘A. Yes.

‘Q. And what is the purpose or what function is performed by the member 36-B of the said Thomas Strain patent?

‘A. The purpose or function of this is to discharge the fruit into the bin at a given point so as to distribute the fruit uniformly throughout the bin, the idea being that if the fruit is allowed to run into the bin from the grader at different points along the bin there will be an equal distribution.’ ”

In summing up appellant’s argument on said appeal No. 2960 appellant Porterville Citrus Association therein, says in its brief on page 87:

“Appellant’s device in general construction and mode of operation conforms to the invention of the prior Thomas Strain patent 775,015.”

We might rest the submission of this branch of this appeal upon the solemn assertions of the Porterville Citrus Association thus made to this court. If such assertions are true they conclusively show the appropriation by the Porterville Citrus Association and Mr. Parker of the Thomas Strain invention under discussion. In fact, it would seem that infringement is admitted.

There is no defense to the validity of the Thomas Strain invention under discussion. It is conceded that he was the original and first inventor thereof.

Claims 18 and 19 of the Thomas Strain patent refer particularly to this portion of the Thomas Strain invention, while claim 37 thereof refers to a general combination of the third or alternative grading element construction in combination with this arrangement of the means for distributing fruit throughout a given bin. This latter claim 37 will be discussed after a discussion of the third or alternative form of the Thomas Strain invention.

Claims 18 and 19 are as follows:

"18. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, and stationary guards and deflectors mounted above said conveying means.

"19. A fruit-grader comprising means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel, an inclined grading-rod lying along said line of travel above said conveying means, means for rotating said grading-rod, and stationary guards mounted above said conveying means, each guard comprising offset walls, each wall lying in different vertical planes, the inner wall lying adjacent said grading-rod."

To avoid controversy let us adopt, for the sake of comparison of these claims, the description of defendant's machine as given by appellant Porterville Citrus Association in its brief in case No. 2960 and refer to the drawings inserted opposite said page.

Claim 18 of the Thomas Strain patent calls for the following elements, which, as they are recited, will be pointed out in the defendant's machine:

“means for conveying fruit along a definite line of travel, said means being inclined transversely of the line of travel.”

In defendant's machine the grading belt and the conveyor belts C, C', all extend along the line of travel and are inclined transversely of the line of travel. The grading belt carries the fruit along under the roller section until it is discharged through the proper grade opening. As we have heretofore pointed out in this comparison with the Thomas Strain invention, the defendant has not utilized a portion of its grading belt as the conveying belt of its distributing system, but it provides separate narrower belts therefor which form in effect a continuation of the grading belt. The function, however, is the same. This is admitted by the defendant in the portions of its brief heretofore referred to.

“an inclined grading-rod lying along said line of travel above said conveying means.”

In the Strain patent this is the inclined grading rod 20. In the defendant's machine it is the inclined grading rod made up of a series of rollers which extend above the belt for the same purposes as in the Thomas Strain patent.

“means for rotating said grading-rod.”

Unquestionably there are means for rotating both the grading rod 20 and the grading rod made up

of a series of rotating rollers in defendant's machine. It will be noted in this connection that all of the rollers on the roller side of the fruit runway in defendant's machine turn in unison and form a continuous roller side. This is one of the very factors which was so much urged on this court in the appeal of Mr. Parker in case 2772 in this court, the opinion being reported in 240 Fed. 703.

"stationary guards and deflectors mounted above said conveying means."

In the Thomas Strain patent drawings the stationary guards are shown at 36 and the deflectors as the parts 36b. In the defendant's machines the stationary guard is formed by that portion of the frame from which the outlets E are cut. (Defendant's drawings opposite page 76 of its brief in case 2960.) This guard is stationary and performs identically the same function as the stationary guard 36. [See for example Record, page 526, Figs. V and VI of the drawings of the Thomas Strain patent.] It will be noted in this connection that this stationary guard is in one vertical plane while the deflector 36b is arranged in another or lower plane and corresponds to the barriers F in defendant's machine, only two of which are shown in the drawings, Fig. 2 of defendant's brief, and none of which are illustrated in Fig. 1. Defendant not only admits, but has urged, that the function of these parts is the same as the function of the corresponding parts in the Thomas Strain device.

The 19th claim of the Thomas Strain patent differs from the 18th only in that the guards preventing the

fruit from yielding to gravity and running off the inclined belt are described as arranged in sections, one section being above the other and the sections being offset. This is also true in defendant's machine as illustrated in Fig. 2 of defendant's drawings of its machine, defendant's brief, page 76, where it will be seen that the upper guard is formed by a portion of the framework of the machine and that below the grade-opening or discharge outlet E is arranged a barrier piece or guard corresponding to the lower guard of the Thomas Strain patent. It will be noted also that defendant's machine corresponds with the language of the latter part or last clause of this 19th claim in that the inner wall or guard lies adjacent the grading rod. This is identically the location of the guard formed by the piece from which the outlets E are cut. This piece blocks up any possibility of the fruit running out at this portion and this is the identical function of the upper portion of the guard 36 of the Strain patent.

The rule of patent law that making in two pieces or parts an element of a combination without substantially changing the function or mode of operation does not avoid infringement is too well settled to need the citation of authority. See, for example:

Standard Co. v. Fastener Co., 113 Fed. 162.

This rule has been often applied by this court, as in
Kings County Raisin & Fruit Co. v. U. S. Consolidated Co., 182 Fed. 59.

Giving, then, this Thomas Strain patent and claims 18 and 19 thereof only a fair scope and not requiring

the broadest or most liberal application of the doctrine of equivalency, it is clear that defendant's machines infringed both of these claims and that defendant has, as it has conceded, appropriated this essence of the Thomas Strain invention.

Complainant's expert, Mr. Knight, in considering this feature of the Thomas Strain invention testifies:

"A. Comparing the guides or deflectors in the Porterville machine, as shown at H in Exhibit 5 with the so-called guards indicated at 36 in figure 1 and 11 of Exhibit 3, the function of these guards is to deflect the fruit and cause it to leave the conveyor at a definite point so that it will be discharged into the bin at the proper point, and in this respect this function of the guards in the Plaintiff's Exhibit 3 is performed by the guards H, Exhibit 5, it being understood that these guards 36—

Q. (By the Court): Where? Point it out.

A. Right here. (Indicating to the court.)

Q. Oh, yes.

A. —do not have the longitudinal adjustability which is common to the Porterville machine, Exhibit 5, to Exhibit 3, but insofar as they form a definite control of the path of the fruit from each grader opening to a definite part of the corresponding bin, they perform the function of Exhibit 3.

Q. (By Mr. Lyon): Do they perform that function in a different or substantially the same manner as the deflectors or guards of Exhibit 3?

A. In my opinion, they perform the function in substantially the same manner for the reason while these two parallel opposite portions of the guard

36, in Exhibit 3, are connected by an oblique portion, yet the same effect is produced by the two parallel opposite guard members shown at H at the right-hand side of Exhibit 5, these guard members overlapping, so that when the fruit runs past the end of the upper guard member, gravity will carry it down against the lower guard member, and it will then run along the same for discharge into the bin at a definite point."

Thomas Strain's Alternative Grader or Sizer Invention.

Reference has heretofore been made to the fact that the Thomas Strain patent showed three inventions. We have now to deal with the third of these. It refers to the construction and formation of the grading element and to the means whereby the grading openings or outlets may be adjusted. Instead of adjusting the roller side of the fruit runway Thomas Strain conceived the idea of adjusting the belt toward and away from the roller. His means for so doing are illustrated in Figs. VII and IX of his drawings and are described as follows in his specification:

"The space between the rods 20 and the conveyor-belt may be adjusted in two ways—either by raising or lowering the grading-rods 20 by means of the arms 21, or by raising or lowering the leaves 13 by moving the wedges 16 in or out by manipulation of the levers 17. *The latter method is preferable* for the reason that it does not throw the grading-rod 20 out of its natural alinement. It should be understood that as the grading-rod 20 is slender it permits of being adjusted within reasonable limits—that is, it per-

mits being thrown out of straight alinement. By raising and lowering the leaves 13 accurate adjustment of space may be secured for each section of the grader. It should be understood that the movement of the leaves or of the rods 20 when being adjusted is very slight, comparatively, and that the guards 36 are arranged a sufficient distance above the conveyor-belt to allow the desired movement in adjusting the leaves." [Transcript Record, page 530, lines 110, *et seq.*]

It is thus seen that instead of adjusting portions of the roller side of the run-way towards the belt, as involved in the *Stebler v. Riverside Heights Ass'n* litigation, 205 Fed. 735 and 240 Fed. 703, Thomas Strain has provided a different mode of operation, consisting of adjusting progressive portions of the belts nearer the rollers. This can be accomplished in a device wherein a flat wide grading belt is used, but it cannot be accomplished in a device wherein a round belt or rope like that of the Robert Strain re-issue patent [Transcript Record, page 511] is used.

Defendant, in its machines, uses this alternative construction of grader element. It is true that it does not use the exact form of "hinged leaves" 13. Instead of providing the hinged form of support for the traveling grader belt it provides in its machines the plates or leaves X having adjusting screws Y, as set forth in Mr. Knight's sketch, Complainant's Exhibit No. 10 [Transcript Record, page 559]. There is one of these plates X mounted in an opening in the bed plate or supporting table (over which the grading belt runs) directly opposite the reduced portion or smaller gradua-

tion of each of the roller sections, and by turning the threaded bolt Y the plate X may be raised or lowered to raise or lower the belt toward or away from the surface of the roller, thereby adjusting the grade-opening. It is by this means that the grade-openings or discharge outlets of the defendant's machine are adjusted. The sole difference between the specific form shown and described by Thomas Strain and the defendant's form is in the mounting of these leaves or plates X. That the result is accomplished in identically the same way, i. e., by raising or lowering the leaf or plate and thereby raising or lowering the belt toward or away from the surface of the rotating members is apparent. There is here then merely a change of form without change of function or interrelation of parts.

In *Louden Machinery Co. v. Strickler*, 195 Fed. 751, 756, the Circuit Court of Appeals for the Seventh Circuit says:

"Whether the 'annular lip' be supported in its functioning position by a dog having a solid body or a skeleton frame is immaterial to the actual invention disclosed and claimed. *Form is material only so far as it is essential to the operation, or indispensable, by reason of the state of the art, to the novelty of the claim.*"

In *Ide v. Trorlicht, Duncker & Renard Carpet Co. et al.*, 115 F. 137, the Court of Appeals (8th Cir.), says:

"Mere changes in the form of a device, or of some of the mechanical elements of a combination, will not avoid infringement, where the principle

or mode of operation of the invention is adopted, except in those rare cases in which the form of the improvement or of the element changed is the distinguishing characteristic of the invention.”

The Circuit Court of Appeals for the Sixth Circuit, in *Dowagiac Co. v. Superior Drill Co.*, 115 Fed. 886, says:

“One does not escape liability for infringement by changing the form or dimensions of the parts of a patented combination, where such change does not break up or essentially vary the principle or mode of operation pervading the original invention.”

The Circuit Court of Appeals of the Seventh Circuit, in *Adam v. Folger*, 120 Fed. 260, says:

“Variation of form, location or sequence of the elements of a combination from that defined in the claim of a patent where such location is not essential to the result of the patentee desired, nor made indispensable to novelty by the state of the art, does not avoid infringement as would omission of an element from a combination.”

And in *Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co.*, 132 Fed. 614, the court says:

“A specific description of an element in a claim does not operate as a limitation to the form shown unless it is of the essence of the invention, and evasion of the specified form will not escape infringement when the substance of the invention is copied, as a court does not judge about similarities or differences by the names of things, but looks to the machines, or the several devices or elements, in the light of the function they perform.”

We thus find that we have for consideration a thing or entity,—a combination,—which is for a given purpose and consists of certain parts or elements having specified relations to each other to perform certain functions. This organization must be considered “in the law of what they (the elements or parts) do or what office or function they perform.” (Bates v. Coe, 98 U. S. 31.)

As said in *Columbia Wire Co. v. Kokomo Steel & Wire Co.*, 143 Fed. 116:

“Infringement of a combination claim is not escaped by transposition and rearrangement of some of the elements where there is no substantial difference in principle or result of the combined means and operation. *A patentee is entitled to protection against evasions of the wording of a claim.*”

As said in *Wagner Typewriter Co. v. Wyckoff, Seamans & Benedict*, 151 Fed. 585-593:

“Infringement is not avoided by changes in a patented machine which are non-essential, as by changing the position of parts or transferring a function from one part to another, without affecting the principle or mode of operation.”

In *Ferry-Hallock Co. v. Hallock*, 142 Fed. 172, 176, the court says:

“Where the whole substance of an invention—that which entitled the inventor to a patent—may be copied in a different form, it is the duty of the court to look through the form of an alleged infringing device for the substance which the patent

was designed to secure, and where that is found there is infringement.”

In *Seeger Refrigerator Co. v. American Car & Foundry Co.*, 171 Fed. 416, it is said:

“Infringement is shown where the alleged infringing device operates on the same principle as that of the patent, and accomplishes the same result in substantially the same way by equivalent means; the only difference being in the form or proportions of the parts.”

In *Weber Electric Co. v. Union Electric Co.*, 226 Fed. 482, the court holds:

“Merely changing the form or location of the mechanical elements of a patented structure does not avoid infringement, if such alterations are but different ways of mechanically expressing the dominant feature of the inventive idea and achieve the same result in substantially the same way.”

As said by Judge Nelson in *Tatham v. LeRoy* (2 Blatchf. 486):

“Formal changes are nothing—*mere mechanical changes* are nothing; all these may be made outside of the description to be found in the patent, and yet the machine, after it has been just changed in its construction, is still the machine of the patentee, because it contains his invention, the fruits of his mind, and embodies the discovery which he has brought into existence and put into practical operation.”

And the Circuit Court of Appeals for the Eighth Circuit in *Lourie Implement Company v. Lenhart* (130 Fed. 122) says:

“One may not escape infringement by adding or subtracting from a patented device by changing its form or by making it more or less efficient, while he retains its principle and mode of operation, and attains its result by the use of the same or equivalent means.”

As said by the court in *Eck v. Kutz* (152 Fed. 758):

“The question is whether the inventive idea expressed in the patent has been appropriated; and if it has, infringement has been made out.

“But with all this the operation is essentially unchanged, not only the whole, but of each part, and this is the significant thing.”

As said by the Circuit Court of Appeals for the Sixth Circuit, in *Vrooman v. Penhollow*, 179 Fed. 296:

“Whether an invention be a pioneer, or, being of small importance, is ranked at the foot of the line, the rule is that it shall be judged on its own merits; that is to say, according to the advance it has made in novelty and utility beyond the prior art.”

McSherry Mfg. Co. v. Dowagiac Co., 101 Fed. 716;

Penfield v. Chambers Bros. Co., 92 Fed. 639;
Paper Bag Co. case, 210 U. S. 405.

It is to be noted that the drawings of the defendant's machine inserted by defendant in the appellant's brief in appeal No. 2960, opposite page 76, do not illustrate in any manner these adjusting leaves or plates. It will be noted that the reason why defendant conceded that the injunction might issue under the *Robert Strain* re-issue against the use of the adjustments of

the brackets which held the rollers was because defendant contended it secured the adjustment of its grade openings by means of these adjustable leaves or plates X, and the lower court so found.

This alternative form of the Strain invention is covered by claims 5, 7, 8, 9, 10, 11, 12, 13 and 37, being in the latter claim claimed in combination with the second portion of the Strain invention, i. e., the distribution of the fruit in the given bin.

The correspondence of the defendant's machine to the respective combinations embraced within or called for by these respective claims may be pointed out as follows

STRAIN PATENT.

DEFENDANT'S MACHINE.

CLAIM 5.

(1) Traveling means for conveying fruit along a definite line of travel embracing movable opposite inclined portions, the belt 10 and the leaves 13.

The grading belt and the table or bed on which it is supported and having the plates inclined to correspond to the belt.

(2) Flexible means for retaining fruit on each side of said inclined portions.

The roller side of the grader which has its axis inclined with respect to the horizontal extension of the belt lengthwise of the grader.

In the Strain patent a "double" grader, i. e., one having two grade-ways, or

In defendant's machine the machine is "double" in the same sense and the

duplicate devices on each plates for adjusting the side, is shown. The leaves belt are arranged opposite 13 are arranged opposite those on the other side. each other so that both Thus corresponding to the sides are alike. intent of the claim.

Note the claim is not specifically limited to, nor does it care for or describe, any particular form or construction of means for moving the leaves up or down.

CLAIM 7.

(1) Traveling means The respective inclined for conveying fruit along grading belts. a definite line of travel (the opposite parts of the belt 10).

(2) Means embracing The plates on opposite movable opposite inclined sides of the machine for portions (leaves 13 on opposite adjusting and supporting sides of the machine the belt at the grade openings).

(3) A plurality of flexible inclined grading rods The two roller sections or sides of the respective (a rod 20 for each grade-run-ways. way).

(4) Means for rotating The means for rotating said rods in opposite directions (pulleys 25, shaft 26, Fig. III).

This claim is also for a double grader or a grader having two grading ways arranged opposite each other in one machine. So has defendant's machine. It is

double in the same sense. In both the respective opposite rods 20 or roller sections are rotated in opposite directions due to utilizing opposite sides for contact with the fruit.

CLAIM 8.

This claim differs from claim 7 only in that it calls for the direction of rotation of the grading rods or roller side of the runway to be rotated upward against the tendency of the fruit to pinch between the belt and the roller. This applies equally to defendant's machines.

CLAIM 9.

(1) Means for conveying fruit; the belt 10.	(1) The grading belts.
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(2) Means for <i>supporting</i> opposite sides of said belt in symmetrical positions; the leaves 13.	(2) The table and the movable plates.
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(3) Means for gaging fruit, the inclined grading rods 20.	(3) The two inclined series of rollers.
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CLAIM 10.

This differs from claim 9 only in the inclusion of means for rotating the grading rods or rollers. This means is necessarily found in defendant's machines.

CLAIM 11.

Also double grader claim differing from claim 10 by the addition of the limiting descriptive clause:

“the direction of movement of both rods” (element 3, claim 9) “being such that the moving under-surface of each rod is substantially away from the lower plane of the inclined parts of said belt” to prevent pinching the fruit. Same is true in identically same sense of the rotation of defendant’s roller sections.

CLAIM 12.

- | | |
|---|---|
| (1) A frame. | (1) The frame of the machine. |
| (2) A table consisting of a horizontal portion having a plurality of opposite hinged leaves (13). | (2) The table or support for the two grading belts, this table having the movable plates equivalent in function to the leaves 13. |
| (3) Means for supporting said leaves in a desired position (the adjusting devices 16). | (3) The adjusting and supporting screws and brackets for the plates. |
| (4) An endless belt (10). | (4) The grading belts (in two pieces instead of a single belt, but fully equivalent). |
| (5) Means for propelling the belt (pulleys 25, etc.). | (5) Suitable pulleys. |
| (6) Means for retaining fruit on said belt, etc. (the inclined rod 20). | (6) The inclined roller sections. |

Making an element in two pieces instead of one does not avoid infringement.

Standard Co. v. Fastener Co., 113 Fed. 162 (C. C. A.);

Kings County Co. v. U.S. Cons. Seeded R. Co., 182 Fed. 59 (C. C. A., 9th Cir.);

Standard Caster Co. v. Caster Co., 113 Fed. 162 (C. C. A., 6th Cir.);

H. F. Braummer Co. v. Witte Co., 159 Fed. 726;

Bundy Co. v. Detroit Co., 94 Fed. 524, 538;

Mabie v. Haskell, Fed. Cas. No. 8, 653;

White v. Walbridge, 46 Fed. 526;

Weber v. Accessories Co., 190 Fed. 189;

Pederson v. Dundon, 220 Fed. 309;

Stockland v. Russell Co., 222 Fed. 906;

Yancey v. Enright, 230 Fed. 641 (C. C. A., 5th Cir.)

CLAIM 13.

This claim differs from claim 12 solely in the inclusion as an element of

“means for adjusting each of said leaves independently of the others.”

No question can arise that defendant's machine has means for so independently adjusting each of the plates.

CLAIM 37.

(1) Means for conveying fruit (inclined belt ing belt.
10).

(2) An inclined grading-rod (rod 20).

(3) Means for rotating the rod.

(4) Means for supporting (the belt 10), consisting of the leaves 13.

(5) A bin arranged adjacent each leaf.

(6) Means for adjusting each leaf independently.

(7) A plurality of guards (36).

(2) The inclined roller-sections.

(3) Means for rotating the roller section.

(4) Means for supporting the grading belt including the table and adjusting plates.

(5) A bin arranged adjacent each adjusting plate or leaf.

(6) The rod and adjusting nut carried by the bracket for adjusting each plate independently.

(7) A plurality of barriers which may be and in use are actually arranged as specified.

Defendant relies upon the patent to Elithorpe No. 527,953, dated Oct. 23, 1894, either as an anticipation or as limiting the scope of this (for want of a better term) alternative invention of Thomas Strain. [See Transcript Record, pages 784 to 789.]

An alleged model of this device has been offered in evidence. In this connection it is to be borne in mind that the Elithorpe patent expired without a device of this kind ever having been used. The Ellithorpe patent was a purely "paper patent" the same as the Crosby patent before this court in *Kings County Raisin & Fruit Co. v. U. S. Consolidated Seeded Raisin Co.*, 182

Fed. 59-62. The Ellithorpe device is shown by the testimony of complainant's witnesses to be impractical and the court can readily see from the model in evidence that it would be impractical. The friction of the belts would render the same impractical. This is set forth in the testimony of complainant [Transcript Record, page 450] as follows:

“Q. Now, based upon your experience, what have you to say as to whether a device constructed in accordance with the disclosure of this Ellithorpe patent, Defendants' Exhibit 1, would or would not be practical as an orange grader or sizing machine?

A. I don't think it would be practical.

Q. Why not?

A. Well, in the first place, the mechanical details of construction of that machine would kill it as a practical machine.

Q. What particular details, for example?

A. Well, take for instance that traveling conveyor there, which is whipped around a number of pulleys in this case, in this model, of course, there is only three grading sections, and therefore the labor and friction on the sectional traveling conveyor would be such that to make an extended machine as it would have to be in order to make it practical would be such that I know of no material or no fabric that that conveyor could be made of that would stand it. It would simply tear itself in two trying to drive it and keep it in motion. The reason for that is that the increased and added number of pulleys you would have to run it around, each and every one of those would increase the friction, not only the propelling friction but the breaking friction in the fabric

itself, so much so as to make it a practical machine, and in order to make it practical, it would have to be extended considerably beyond what this model is; I don't believe it could be done.

Q. Now, in regards, Mr. Stebler, to the adjustment of the traveling member toward and away from the roller, would you consider that practical or impractical?

A. I shouldn't consider that practical.

Q. What would be the effect if constructed as constructed in this model, of simply adjusting these wooden pieces toward or away from the belt?

A. Well, as long as you adjust them toward the belt, if you once got them up against the belt, I presume you could adjust that belt within reasonable limits, but when you come to adjust it backwards and away from the belt, it is a question of whether the belt would follow it or not.

Q. Would the adjusting towards the belts, and therefore, toward the roller, tend to increase the friction and labor, I believe you termed it, upon the pulleys?

A. It would increase the friction and labor on the conveyor.

Q. And that is one of the things you referred to as the reason why you thought, based upon your experience, such a device would be impractical?

A. Yes, sir."

The Ellithorpe patent construction is a thoroughly impractical one. The very fact that the Ellithorpe patent was issued twenty-three years ago, and not a single Ellithorpe machine has ever been used, so far as the

evidence in this case shows, is conclusive against its impracticability.

As said by this court in 182 Fed. 62, speaking through His Honor, Judge Gilbert:

“The Crosby invention undoubtedly anticipates and describes the whole theory of the Pettit patent; but it does not appear ever to have been put to use, and there is no evidence that any machine was ever constructed under it. *It is one thing to invent the theory of a machine. It is quite another thing to invent a successfully operating machine.*

“It would seem that it was one of those unsuccessful and abandoned inventions which are held to have no place in the art to which they relate. In an analogous case, Mr. Justice Brown said: ‘His efforts in that direction must be relegated to the class of unsuccessful and abandoned experiments, which, as we have repeatedly held, do not affect the validity of a subsequent patent.’ *Deering v. Winona Harvester Works*, 155 U. S. 286, 302, 15 Sup. Ct. 118, 124, L. Ed. 153.”

As said by the Supreme Court in *Coffin v. Ogden*, 18 Wall. 120:

“The invention or discovery relied upon as a defense, must have been complete, and capable of producing the result to be accomplished. If the things are embryotic or inchoate; if it rested in speculation or experiment * * * it cannot avail to defeat a patent founded upon a discovery or invention which was completed; while in the other case there was only progress, however, near that progress may have approximated to the

end in view. The law requires not conjecture but certainty.”

It is well settled on authority that the fact that the Ellithorpe theory having never been used, the patent having long since expired, and being free to the use of all, not simply justifies, but on the contrary requires the court to place a narrow construction on its effect as an anticipation and as a limitation. The rule is that all doubt must be resolved against such a paper patent, in the very manner as applied by this court in the raisin seeder case, 182 Fed. 59.

As said in Hopkins on Patents, Sec. 211, page 263:

“Rule XXIX. THAT THE ALLEGED ANTICIPATORY MATTER HAS NEVER GONE INTO PRACTICAL USE MAY BE CONSIDERED IN DETERMINING THE QUESTION OF ANTICIPATION.

“Thus, Judge Putnam has said: ‘Anticipatory matter which has never gone into practical use is to be narrowly construed.’ Simonds Rolling Mach. Co. v. Hathorn Mfg. Co., 90 Fed. Rep. 201, 208, and Judge Buffington has said: ‘In determining a question of this character it is a pertinent and reasonable inquiry, if it be true that the disclosure of an earlier patent was substantially that of Jones, why during a period of many years, was it not practically applied to the same use?’ Carnegie Steel Co. v. Cambria Iron Co., 89 Fed. Rep. 721, 738; citing Regulator Co. v. Copeland, 2 Fisher 221, Fed. Cas. No. 2866. Judge Colt has said: “If the question of identity of method and result is doubtful, *the doubt must be resolved in favor of the successful patentee, who has in a practical way materially advanced the art.*’ Simonds Rolling

Mach. Co. v. Hathorn Mfg. Co., 93 Fed. Rep. 958, 961; citing Washburn v. Gould, 3 Story 122, 144 Fed. Case No. 17,214."

Complainant's expert made the sketch Complainant's Exhibit 10 at Porterville from the defendant's machines. He testifies:

"In this sketch the part marked 'X' is a plate, which extends below the belt in an opening in the bed on which the belt runs. This plate is adjusted by a screw or bolt marked 'Y,' so as to raise or lower the belt, and adjust its distance from the roller marked 'Z'. This adjusting means is directly beneath the smaller portion marked 'Z' of the roller, so that this adjusted portion of the belt, together with the smaller portion of the roller, form the grade opening and this adjustment provides for adjusting the width of the grade opening. This is equivalent to the construction in Exhibit 3 (T. Strain patent) consisting of the inclined leaves referred to as hinged leaves 13, as shown in figure 8.

By the Court: Where is that?

A. (Indicating to the court): In figure 7 of Exhibit 3.

Q. I don't understand it. What is there in this drawing that is like this that raises the belt up?

A. The wedges shown in figure 9 at—

Q. Oh, this wedge thing?

A. The wedge, yes. It raises the hinged leaf.

Q. Oh, yes, I know what you are talking about now.

A. So as to adjust or vary the distance between the belt running on the hinged leaf and the rotating rod 20.

Q. (By Mr. Lyon): There are hinges at 14 of figure 17, so that you can raise the belt towards or drop it away from the roll or roller. Proceed, Mr. Knight.

A. The construction of this is different from that of the Porterville machine, in that the adjustable support for the belt is hinged, and its height is adjustable by a wedge, instead of being grooved (moved) directly up and down by a bolt as in the Porterville machine, but its effect upon the belt is just the same, and its effect on controlling the size of the grading opening is the same. In respect, therefore, to the mode of operation of the machine as a grader this part is the equivalent." [Transcript Record, pages 216-218.]

See also:

Mr. Knight's testimony on cross-examination,
page 234;

Defendant's witness Milligan, Record, page 309;

Defendant's witness Brookhart, Record, page
336;

Defendant's witness Ofstad, Record, page 384.

It is apparent from the testimony of these witnesses that there is no conflict of testimony as to this means of adjusting the grade-openings in defendant's machines.

As each of the elements of the machines performs its function in substantially the same manner as the corresponding element in the Strain patent disclosure, and performs substantially the same function, it is clear that there is true mechanical equivalency and infringement.

No simpler example of equivalency exists than the substitution of a screw for a wedge. This is one of Mr. Walker's examples in his treatise on "Patents."

In *Brown Bag Filling Machine v. Drohen*, 140 Fed. 97, 100, it is said:

"The similarities and differences of machines and combinations are to be determined by the offices or functions which they perform, by the principles on which they are constructed, and by the modes which are used in their operation. A device which is constructed on the same principle, which has the same mode of operation, and which accomplished the same result as another by the same or by equivalent mechanical means, is the same device, and a claim in a patent of one such device claims and secures the other." Citing *Machine Co. v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935."

In *Bucher & Gibbs Co. v. International Harvester Co.*, 211 Fed. 475, it is said:

"The structure of the defendant is practically a copy of the structure made by complainant, with the exception that the anti-tilting devices are different in form and the manner of location, but perform substantially the same functions."

Referring again to this Kings County case in 182 Fed., at page 59, this court there says:

"It does not necessarily follow, from the fact that the claim describes a specific form of construction, that the inventor shall be limited to that form."

As said by the Supreme Court of the United States

“It is generally true, when a patentee describes a machine and then claims it as described, that he is understood to intend to claim and does by law actually cover, not only the precise forms he had described, but all other forms which embody his invention; it being a familiar rule that, to copy the principle or mode of operation described, is an infringement, although such copy should be totally unlike the original in form or proportions.”

“And, therefore, the patentee, having described his invention and shown its principles and claimed it in that form which most perfectly embodies it, is in contemplation of law deemed to claim every form in which his invention may be copied. * * *”

This court in the case of Los Angeles Art Organ Co. v. Aeolian Co., 143 Fed. 887, said:

“In passing upon the issue of infringement, the question to be determined is whether, under a variation of form or by the use of a thing which bears a different name, the defendant accomplished by his machine the same purpose or effect as that accomplished by the patentee, or whether there is a real change of structure or purpose. If the change introduced by the defendant constitutes a mechanical equivalent in reference to the means used by the patentee, and if besides being an equivalent it accomplishes something useful beyond the effect or purpose accomplished by the patentee, it will still be an infringement as respects what is covered by the patent, although the further advantage may be a patentable subject as an improvement on the former invention.” Citing the Blandy v. Griffith case, as follows:

“ ‘As long as the root of the original conception remains in its completeness, the outgrowth—whatever shape it may take—belongs to him with whom the conception originated.’ ”

The Circuit Court of Appeals of the Eighth Circuit, in *Lewis Blind Switch Co. v. Premium Mfg. Co.*, 163 Fed. 951, says:

“A patent for an invention which is neither primary nor a slight improvement on the prior art, but possesses substantial patentable novelty, covers a reasonable range of equivalents.

“In interpreting the claims of a patent, proper regard should be had to the natural import of the terms in question, the context and the specification.”

The Supreme Court has repeatedly held that a charge of infringement may be made out though the letter of the claims is avoided:

Machine Co. v. Murphy, 97 U. S. 120;

Ives v. Hamilton, 92 U. S. 426-431;

Morey v. Lockwood, 8 Wall. 230;

Elizabeth v. Pavement Co., 97 U. S. 126, 137;

Sessions v. Romadka, 145 U. S. 29;

Hoyt v. Horne, 145 U. S. 302.

This court has repeatedly held that without being a truly “pioneer” or “primary” invention the inventor may be entitled to a liberal application of the doctrine of equivalency.

Parker v. Stebler, 177 Fed. 210;

Stebler v. Riverside Hts. Assn., 205 Fed. 735.

In the Paper Bag Machine case the Supreme Court had before it a patent for an invention which had never been put to commercial use, the patent having been purchased and "shelved," as the owner preferred to market another type of machine, just the same as complainant has preferred to market the Robert Strain grader, and has held the Thomas Strain grader from the market. Yet the Supreme Court of the United States did not hesitate to give the bag machine patent the recognition to which it was entitled and to broadly construe it. Its decision in that case is the modern rule on the doctrine of equivalency and utterly destroys the old claim that an invention must be "pioneer" or "basic" to be entitled to the doctrine of equivalency. See

Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405.

It is submitted that the decree of the District Court is in error and should be reversed and an injunction granted against the infringement of the Thomas Strain patent as herein urged.

FREDERICK S. LYON,
Solicitor for Appellant.

United States
Circuit Court of Appeals 10
For the Ninth Circuit.

LAURA A. BOOMER,

Appellant,

vs.

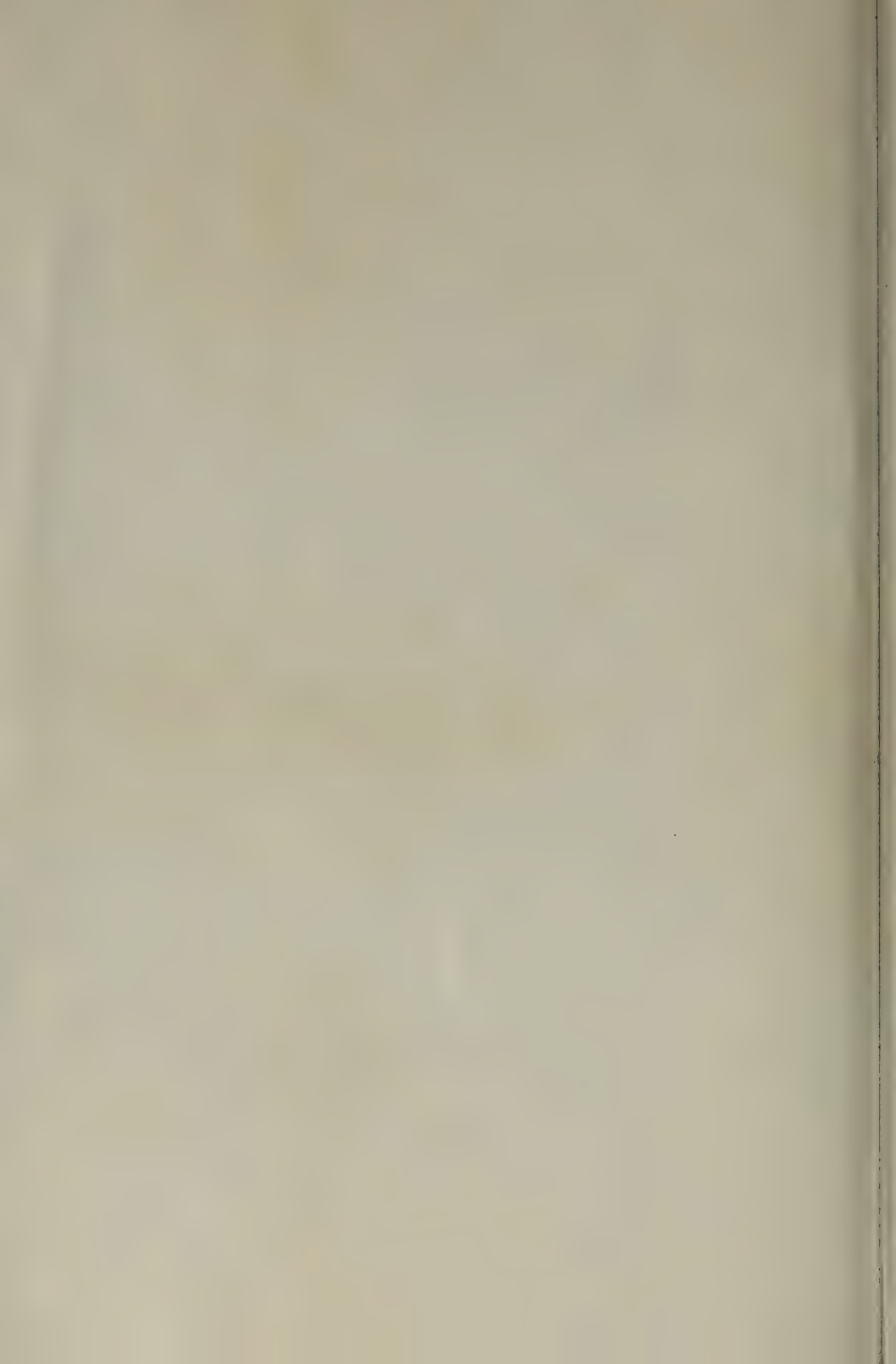
JAMES H. ROWE,

Appellee.

Transcript of Record.

**Upon Appeal from the United States District Court
of the District of Montana.**

FILED
JUL 10 1917
P. D. MONTANA



United States
Circuit Court of Appeals
For the Ninth Circuit.

LAURA A. BOOMER,

Appellant,

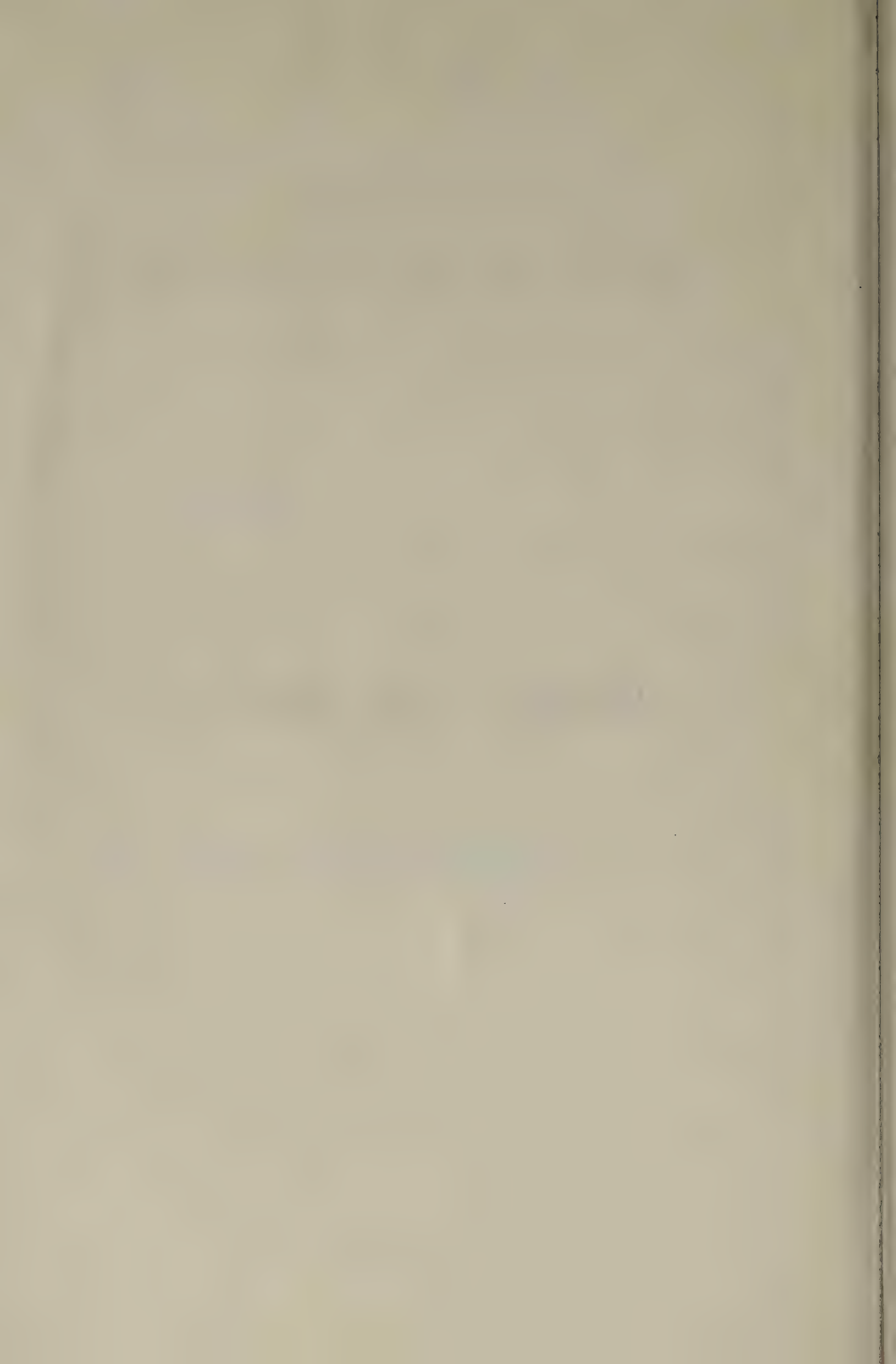
vs.

JAMES H. ROWE,

Appellee.

Transcript of Record.

**Upon Appeal from the United States District Court
of the District of Montana.**

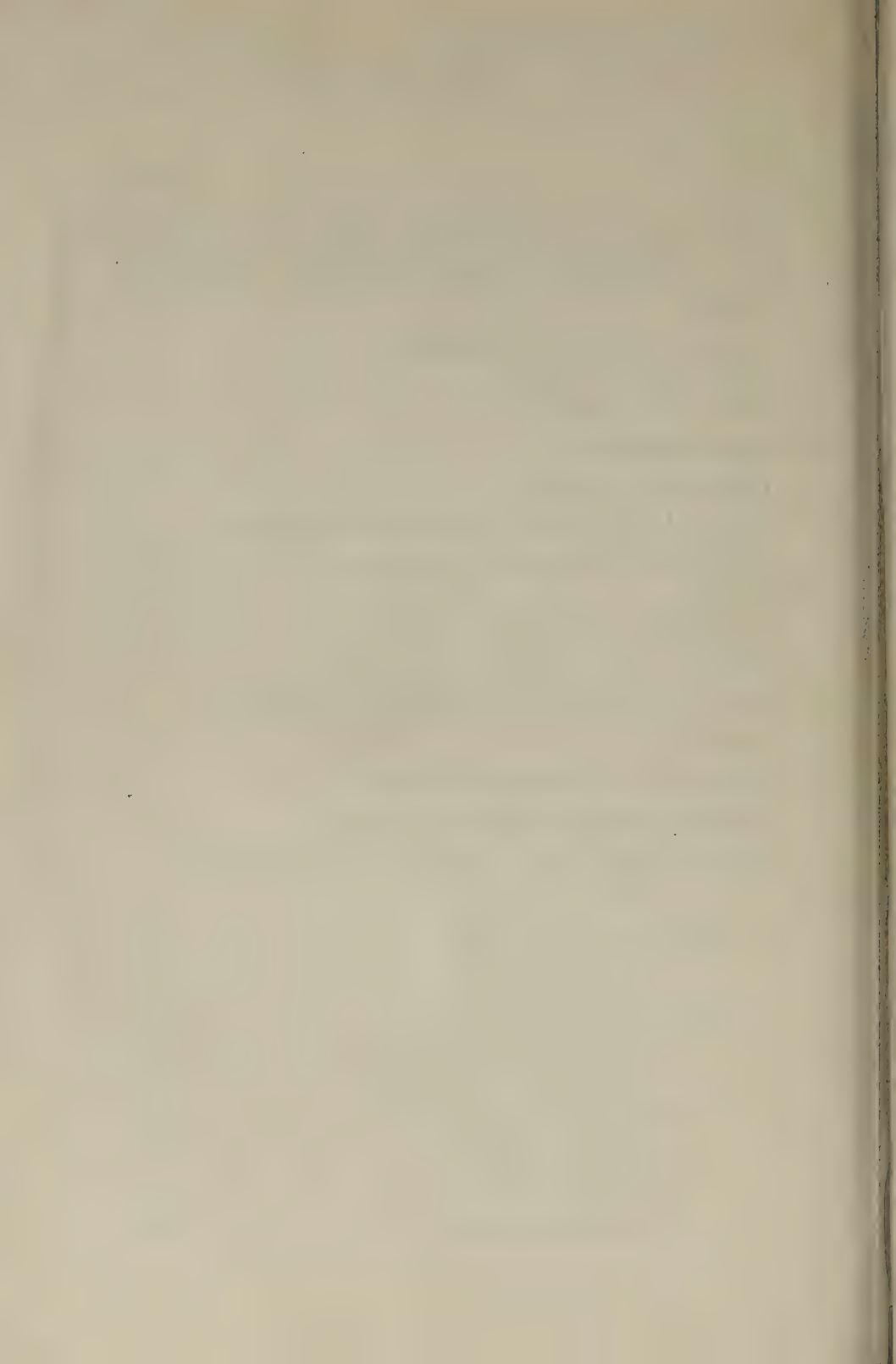


INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

Page

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

Answer to Bill of Complaint.....	10
Assignment of Errors.....	20
Bill of Complaint.....	2
Bond on Appeal.....	23
Citation on Appeal.....	25
Clerk's Certificate to Transcript of Record....	48
Condensed Statement of Evidence.....	27
Decree.....	19
Memorandum Decision.....	14
Motion to Dismiss Bill of Complaint.....	8
Names and Addresses of Solicitors of Record..	1
Opinion.....	14
Petition for Allowance of Appeal.....	21
Praeceptum for Transcript of Record.....	47
TESTIMONY ON BEHALF OF PLAINTIFF:	
BOOMER, H. H.....	39
Cross-examination... ..	39
ROWE, JAMES H.....	31
Cross-examination... ..	33
Redirect Examination.....	36
WHITCOMB, E. W.....	27
Cross-examination... ..	30
Recalled.....	37
Cross-examination... ..	37



[1*] Names and Addresses of Solicitors of Record.

JOHN O. DAVIES, Butte, Montana,

MAURY & WHEELER, Butte, Montana,

Solicitors for Complainant.

JESSE B. ROOTE, HENRY C. HOPKINS, ENOS

E. ALLEY and J. A. POORE, Butte, Montana,

Solicitors for Defendant.

*In the District Court of the United States, for the
District of Montana.*

IN EQUITY—No. 41.

LAURA A. BOOMER,

Complainant,

vs.

JAMES H. ROWE,

Defendant.

BE IT REMEMBERED that on the 8th day of July, 1916, Bill of Complaint was filed herein, which is in the words and figures as follows, to wit:

[2] *In the District Court of the United States, in
and for the District of Montana.*

IN EQUITY.

LAURA A. BOOMER,

Plaintiff,

vs.

JAMES H. ROWE,

Defendant.

*Page-number appearing at top of page of original certified Transcript.
of Record.

Bill of Complaint.

To the Honorable the Judges of the Above-entitled Court:

The plaintiff, your orator, a citizen of the State of Washington, residing at Spokane, Washington, brings this bill of complaint in equity against the defendant, a citizen of Montana, and for a cause of action where the amount involved is more than three thousand (\$3,000.00) dollars, and thereupon your orator, in behalf of herself and all other parties similarly situated who desire to come in or intervene, complaining, alleges:

1.

That Laura A. Boomer, the complainant, at all times herein mentioned, was and now is a citizen of the State of Washington.

2.

[3] That James H. Rowe, defendant, at all times herein mentioned was and now is a citizen of the State of Montana.

3.

That the amount involved in this suit in equity, exclusive of interest and costs, is more than the sum of three thousand (\$3,000.00) dollars.

4.

Further your orator alleges that at one time, and before the dissolution by insolvency as hereinafter set out, of all of its property, there existed a corporation organized and then existing under and by virtue of the laws of the State of Montana, known as and

called Salmon Land Company, with principal office in Butte, Montana.

5.

That there was never issued of the capital stock of said Salmon Land Company more than the amount of one thousand (1,000) shares of the par value of ten (\$10.00) dollars per share; that there was never subscribed by any person or any persons or any corporation during the life of the said Salmon Land Company or at all, more than the said amount of one thousand (1,000) shares; nor was any money more than the sum of ten thousand (\$10,000) dollars for the said one thousand (1,000) shares so subscribed and so issued ever paid in for capital stock of any kind to the said Salmon Land Company.

6.

[4] That on or about the 14th day of April, A. D. 1910, James H. Rowe, being then a director of said Salmon Land Company, the said James H. Rowe being then also secretary of the said Salmon Land Company, caused the said Salmon Land Company to become indebted in a sum in excess of its said capital stock then issued or subscribed, to wit, in the sum of twenty thousand five hundred and twenty and $73/100$ (\$20,520.73) dollars; and the said James H. Rowe, with other directors, for a valuable consideration proceeding from Laura A. Boomer, this plaintiff, to said Salmon Land Company, did make, execute and deliver to the said Laura A. Boomer, a certain promissory note in words and figures as follows, to wit:

"\$20,520.73 Butte, Montana, April 14th, 1910.

For value received, we, Salmon Land Company, a corporation, promise to pay to the order of Laura A. Boomer, twenty thousand five hundred and twenty and 73/100 (\$20,520.73) dollars on or before five years from this date, at the First National Bank of Butte, Montana, with interest at eight per cent per annum until fully paid, reserving the right to pay installments of said sum at any time of any amount, and whenever so paid interest on the amount shall cease. Interest payable annually.

SALMON LAND COMPANY,
By CHARLES CADY,
President.

JAMES H. ROWE, Secretary."

And they, the said Salmon Land Company and all its directors, including said James H. Rowe, did at the same time make, execute and deliver a certain indenture of mortgage to secure the said promissory note, and the same was delivered to the said Laura A. Boomer, and said Salmon Land Company was caused to deliver the same by its directors including James [5] H. Rowe; and the said indenture of mortgage did provide among other things, that "in case default shall be made in the payment of the said principal sum of money or any part thereof as provided in said note, or if the interest be not paid as herein specified, then and from thenceforth it shall be optional with the said party of the second part, her executors, administrators or assigns, to consider the whole of said principal sum expressed in said note as immediately due and payable, although

the time expressed in said note for the payment thereof shall not have arrived."

7.

That said Salmon Land Company did default in the payment of the interest which thereafter accrued on said note, and failed entirely to pay the same.

8.

That Laura A. Boomer, this plaintiff on March 17th, 1913, and after such default had been made, did consider the whole of the said principal sum due and unpaid, and both the same are entirely unpaid save as hereinafter set out; and thereupon she did commence in the District Court of the Sixth Judicial District of Idaho, in and for the County of Lemhi, her certain suit for the foreclosure of the said note for a judgment on the said note, both as to its principal and interest, and for the attorney's fees provided in the said mortgage in the event of suit thereon.

9.

[6] That the defendant Salmon Land Company duly and regularly appeared in the said suit by an attorney at law admitted in all the courts of Idaho, one A. C. Sherry, he being by said Salmon Land Company duly authorized so to do.

10.

And thereafter such proceedings were had, to wit, that on or about the 30th day of December, 1913, there was by the said court duly made and entered a certain judgment, and there was by the said Court duly made and entered on or about the said day a certain decree of foreclosure of the mortgage

hereinbefore mentioned, and given to secure the said promissory note hereinbefore set out; and thereafter, and on the 30th day of January, 1914, the sheriff of the said county sold to the highest bidder for cash, after due and legal notices of same as required by the laws of Idaho, all of the property, real and otherwise, described in and incumbered by the said mortgage, the highest price bid, and the highest bid accepted by the said sheriff for the said property was the sum of twenty thousand and five hundred (\$20,500.00) dollars; that the legal expense of said sale by sheriff was one hundred and forty-six and 50/100 (\$146.50) dollars; that the amount unpaid of said judgment instantly before said sale was twenty-five thousand four hundred and sixty-three and 10/100 (\$25,463.10) dollars; that the deficiency of the said bid (less said costs of sale) from said amount of judgment was immediately after said sale, [7] the sum of four thousand nine hundred and sixty-three and 10/100 (\$4,963.10) dollars, no part of which has ever been paid.

11.

That Laura A. Boomer is the owner and holder of said judgment.

12.

That Salmon Land Company became and was on January 30th, 1914, and ever since has been entirely insolvent. It has no property of any kind whatsoever that is of any value at all; that it has entirely ceased to do business. It is thereby dissolved.

13.

That as to how many other parties there are, if

any, similarly situated as the plaintiff,—that is, creditors of the said Salmon Land Company, and entitled to recover against the defendant by reason of the aforesaid acts of the defendant and other acts of a similar nature, if any, this plaintiff does not know and is unable to state to the court.

WHEREFORE your orator prays judgment against the defendant that she have and recover of and from the defendant the sum of four thousand nine hundred and sixty-three and 10/100 (\$4,963.10) dollars, with interest thereon at the rate of eight per cent per annum from the 31st day of January, 1914, until paid; or so much thereof as the plaintiff is entitled to if plaintiff cannot be paid in full, after other [8] persons similarly situated with the plaintiff have received their just proportion of the amount due and owing from the defendant to the plaintiff and other persons similarly situated as herself.

That the defendant be required to set forth the names and amounts due all creditors of the Salmon Land Company similarly situated as the plaintiff, and give a just and true account to this court at the trial of the case of all similar transactions as the ones set forth in this bill, and the names and residences of all creditors of the Salmon Land Company similarly situated as the plaintiff, and the amounts due each and all of them.

That a subpoena issue to the defendant compelling him to answer plaintiff's bill of complaint; and that your orator recover her costs against the defendant; and for such other and further relief as to the

court may seem meet and equitable.

JOHN L. TEMPLEMAN,
LOWNDES MAURY,
J. O. DAVIES,

Solicitors for Complainant.

[Endorsed]: Title of Court and Cause. Bill of Complaint. Filed July 8, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy.

MAURY, TEMPLEMAN & DAVIES,
Attorneys for Plaintiff.

[9] And thereafter, on the 28th day of July, 1916, Motion to Dismiss Bill of Complaint was filed herein, which is as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

IN EQUITY—No. 41.

LAURA A. BOOMER,

Plaintiff,

VS.

JAMES H. ROWE,

Defendant.

Motion to Dismiss Bill of Complaint.

Now comes the defendant, James H. Rowe, above named, and moves the Court to dismiss the bill of complaint herein for the following reasons and on the following grounds:

(a) That the facts stated in said bill of complaint do not entitle the plaintiff to the relief prayed for, or to any relief, in the above-entitled court.

(b) That, on the facts stated in said bill of complaint, the above-entitled court is without jurisdiction to try said cause.

ROOTE & HOPKINS, and
ENOS E. ALLEY,

Attorneys for Moving Defendant.

Service of the above and foregoing Motion to Dismiss the Bill of Complaint is hereby acknowledged, and copy thereof received, this 28th day of July, A. D. 1916.

LOWNDES MAURY,
JOHN L. TEMPLEMAN,
J. O. DAVIES,

Solicitors for Complainant.

[Endorsed]: Title of Court and Cause. Motion to Dismiss Bill of Complaint. Filed July 28, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy.

ROOTE & HOPKINS and ENOS E. ALLEY,
Attorneys for Moving Defendant.

[10] And thereafter, on the 27th day of November, 1916, Answer to Bill of Complaint was filed herein, which is as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

IN EQUITY.

LAURA A. BOOMER,

Plaintiff,

vs.

JAMES H. ROWE,

Defendant.

Answer to Bill of Complaint.

The defendant herein, James H. Rowe, makes the following answer to the Bill of Complaint herein filed by the plaintiff, Laura A. Boomer, to wit:

I.

The defendant says that this suit in equity ought not to be maintained by the plaintiff for the following reasons:

(a) Because the facts and things alleged in the Bill of Complaint are not sufficient to warrant the Court in giving judgment against the defendant herein or to order an accounting of the matters and things set out and mentioned in said Bill of Complaint.

(b) Because by the plaintiff's Bill of Complaint she seeks to recover upon a statutory action which can be prosecuted only in an action at law, and not in a suit in equity. This suit is brought under the provisions of Section 3837 of the Revised Codes of Montana of 1907.

(c) Because in the absence of Section 3837 of the Revised Codes of Montana of 1907 the plaintiff herein would have no cause of action whatever either at law or in equity; and this suit is brought solely under the provisions of said statute of the State of Montana, which statute does not authorize or warrant the Court in awarding an accounting of any kind whatever, but only authorizes the recovery of the alleged debt, in an action at law. Therefore, [11] this suit is brought on the wrong side of the

court, and for this reason the said Bill of Complaint should be dismissed.

II.

The defendant admits the allegations set out in paragraphs numbered 1, 2, 3, 7, 8, and 9 of said Bill of Complaint.

With reference to statements set out in paragraph numbered 4 of the Bill of Complaint the defendant says that the corporation referred to therein and known as and called Salmon Land Company is not now and never has been dissolved but is still in existence.

III.

The defendant admits so much of the allegations in paragraph numbered 5 of the said Bill of Complaint as refer to the amount of capital stock of the said Salmon Land Company that has been issued and admits that no more than Ten Thousand Dollars, par value of said capital stock was ever issued.

The defendant admits that on or about the 14th day of April, 1910, the said Salmon Land Company made, executed and delivered to the plaintiff herein the note of the said Salmon Land Company according to the tenor and effect of the copy of said note set forth in said Bill of Complaint. In this connection defendant, in explanation of the issuance of said note, avers that the said note was given by the said Salmon Land Company to the plaintiff herein as evidence of the indebtedness of the said Salmon Land Company to the plaintiff for a part of the purchase price of certain land in the State of Idaho; that contemporaneous with the giving of said note

the said Salmon Land Company, a corporation, also executed a mortgage on the same land to secure the payment of the said note; that the said mortgage was by the plaintiff foreclosed in the District Court of Lemhi, Idaho, and sold under a decree of foreclosure of said court, foreclosing said mortgage, and the said land was at said sale purchased by the plaintiff herein who is now and ever since has been in possession of the said land. The defendant denies that he, with other directors, or at all made, executed [12] or delivered any note to the plaintiff herein, but that the note was the note of the said Salmon Land Company, and not of this defendant. The defendant admits that the mortgage referred to in said Bill of Complaint was made, executed and delivered, as alleged therein, by the said Salmon Land Company; and the defendant also admits that said Salmon Land Company made default in the complaint thereof.

IV.

With reference to the allegations set forth in paragraph numbered 10 of the said Bill of Complaint this defendant admits that a suit was brought by the plaintiff as alleged therein, to foreclose the mortgage referred to in said Bill of Complaint, but avers that he is without knowledge as to the date when the suit was commenced and without knowledge of the date of the decree therein and the terms of the decree, and is without knowledge of the amount of the judgment or decree and costs, and is without knowledge of the amount of the deficiency judgment therein, if any exists, or has existed.

V.

The defendant herein denies that the said Salmon Land Company, the corporation referred to in the plaintiff's Bill of Complaint, is now or ever has been dissolved, but, on the contrary, alleges that the said corporation still exists and has existed as a corporation at all times since its creation.

VI.

With reference to the prayer of the plaintiff's said Bill of Complaint this defendant says that upon the face of the said Bill of Complaint the plaintiff is not entitled to an accounting such as asked for in the prayer of her said Bill of Complaint, nor to any accounting whatever. And this defendant further says that the plaintiff herein has no cause of action either at law or in equity because of the matters and things set up in the said Bill of Complaint for the reason that the said Salmon Land Company is not now and never has been dissolved, but is still in existence.

[13] WHEREFORE, the defendant herein prays that the plaintiff's Bill of Complaint be dismissed; that she take nothing by her said suit and that this defendant may be permitted to go hence without day, with his costs in this behalf laid out and expended.

JESSE B. ROOTE,

Attorney for Defendant.

Service of above and foregoing answer acknowledged and copy received Nov. 27th, '16.

MAURY, TEMPLEMAN & DAVIES,

Attys. for Plaintiffs.

[Endorsed]: Title of Court and Cause. Answer to Bill of Complaint. Filed Nov. 27, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy Clerk.

[14] And thereafter, on the 1st day of August, 1917, Decision of the Court was filed herein, which is as follows, to wit:

United States District Court, Montana.

LAURA A. BOOMER

vs.

JAMES H. ROWE.

Memorandum Decision.

Plaintiff, creditor of a Montana corporation, for herself and other creditors, sues defendant, director of the corporation, to recover for that as a director he caused the corporation to become indebted in excess of the subscribed stock, contrary to statute. She alleges that for more than two years the corporation has been and now is "insolvent, . . . has entirely ceased to do business," and "it is thereby dissolved." The answer pleads lack of jurisdiction in equity, and that the corporation has not been dissolved.

Section 3837, R. C. Montana, provides amongst other things that the directors must not do certain things, "nor must they create debts beyond their subscribed capital stock. . . . For a violation" thereof the directors responsible "are, in their individual and private capacity, jointly and severally liable to the corporation and to the creditors thereof, in the event of its dissolution, to the full

amount of the . . . debt contracted; and no statute of limitations is a bar to any suit" therefor.

The suit is well brought, equity alone furnishing an adequate remedy.

Stone vs. Chisohm, 113 U. S. 308.

Lyman vs. Hilliard, 154 Fed. 339.

It appears the incorporation is of 1910, for twenty years, [15] for all business purposes. The directors including defendant incurred the debt sued for, and in excess of the subscribed capital stock, Jan. 30, 1914, all its property was sold at sheriff's sale. It has no property, is insolvent, and transacts no business. Its last annual report was filed Jan. 20, 1916, from which it appears its officers were the same as the previous year. Defendant is director now and from the beginning and secretary now and for at least four years. In said report is a recital that the "corporation has ceased to be a going concern and has ceased to voluntarily incur financial obligations because of its insolvency," the local law providing that thereafter directors "shall not be liable for a failure to file annual reports during such time as the disability of such corporation shall continue." Contending the corporation is dissolved within said section 3837, plaintiff cites McDonald vs. Ins. Co. (Al.), 5 So. 120, and other Alabama cases.

Done vs. Jones, 61 Me. 160.

Gibbs vs. Davis, (Fla.), 8 So. 633.

Perry vs. Turner, 55 Mo. 418, and other Missouri cases:

Slee vs. Bloom, 19 Johns. 456.

These are cases wherein statutes imposed upon stockholders a contractual liability to creditors for debts of the corporation dissolved,—very different from section 3837, *supra*, which imposes an obligation upon directors, penal in its nature (see *Moss vs. Smith* (Cal.), 155 Pac. 90.), in favor (1) of the corporation, (2) of creditors in the event of [16] dissolution.

It is worthy of note that the leading case, *Slee vs. Bloom*, involves a situation wherein the stockholders had acted upon a resolution to refrain from further elections and to abandon the property and corporation. They intended to and did abandon all corporate property and franchise rights. The bill in substance charged all this and also that the corporation was dissolved, none of which was denied by defendants. America's greatest chancellor, Kent, dismissed the bill for that the corporation was not dissolved within the meaning of the statute.

He was reversed by a court composed mainly of lay Judges, the Senate of New York, possibly more sensitive to the even then rising tide of popular feeling anent corporations. It is submitted that Kent's reasoning and conclusion are the better. And it is noted that the reversal counts much upon mistaken analogy between common law and canon law so-called corporations sole and more ecclesiastical than lay, and statutory business corporations aggregate, and also proceeds upon failure to distinguish between the condition of the corporation which would authorize the crown in behalf of rights of the Government to there create a new corporation, and the

condition which would defeat the personal privileges of the members of the corporation. Furthermore, the construction was induced by anxiety to [17] furnish a prompt remedy, where otherwise was none or one that might be defeated by time. Limitations were not barred as in the statute of the instant suit, and no right of action was given the corporation which might furnish a remedy to creditors, as in the statutes here. *Ex necessitate*, potent there, is absent here.

The great chancellor in his Commentaries recognizes that the doctrine of *Slee vs. Bloom* is more judicial than legislative, and mildly observes that it "is not to be carried beyond the precise facts on which it rested." Its general statements, however, have been seized upon, its limitations ignored, to expand the doctrine so far that now in assumed application of it to cases involving statutes like Montana's, courts have gone so far as to declare that corporations are dissolved within the intent of the statute, "by insolvency or cessation of business."

Stoltz vs. Scott (Idaho), 129 Pac. 342.

The Montana statute confers the right of action (1) upon the corporation for all the excess debt even though it be not damaged and recovery not necessary for creditors' protection, and (2) upon the creditors for less than the excess debt if sufficient to satisfy their claims, and only upon the happening of a contingency—dissolution of the corporation. The creditors' right arises only when the corporation's expires, viz., when it is so far dissolved that it has no capacity to sue. This corporation has capacity

to sue. It [18] might now sue defendant for the excess debt, and recovery would not be barred by recovery in this suit. For the corporation cannot be concluded in the matter of its property or right of action, by a suit to which it is not a party. Nor is defendant subject to a double liability. The statute imposes none such. Given by statute, creditors take the right subject to the contingency. Nothing in the statute indicates the legislature intended dissolution in other than its ordinary sense, the approved usage of the word elsewhere in the codes, viz., death of the corporation. Failure of election, inactivity or cessation of business "on account of insolvency or for any other reason," are covered by code provisions guarding against dissolution thereby and contemplating future elections, business, solvency.

Other and the usual remedies are available to creditors of inactive and insolvent but not dissolved corporations, obviating necessity for judicial construction to create a right and remedy where the legislature has not. See *Appleton vs. Co.*, (N. J. Eq.) 54 At. 454. The statute has not been construed by the Supreme Court of this State. If the legislature had intended a new right and remedy before dissolution in the approved usage of the word, it is believed it would have plainly said so. The statutory right of action is the corporation's, it is not dissolved within the meaning of the statute; plaintiff has not the right herein asserted, and the suit is dismissed.

BOURQUIN, J.

[Endorsed:] Title of Court and Cause. Memo.
Filed Aug. 1st, 1917. Geo. W. Sproule, Clerk.

[19] And thereafter, on the 17th day of August, 1917, Decree was filed and entered herein, which is as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

LAURA A. BOOMER,

Plaintiff,

vs.

JAMES H. ROWE,

Defendant.

Decree.

This cause coming on regularly to be heard before the above-entitled court on the 26th day of May, 1917, Messrs. H. L. Maury and J. O. Davies appearing as counsel for the plaintiff, and Mr. Jesse B. Roote appearing as counsel for the defendant, and evidence having been produced on behalf of the plaintiff and defendant, and the cause argued and submitted to the Court for decision, and the Court being fully advised as to the law and the facts:

It is ORDERED, ADJUDGED AND DECREED that plaintiff take nothing from defendant by reason of her alleged cause of action, and that plaintiff's alleged cause of action be and the same is hereby dismissed, and that defendant have judgment for his costs, taxed at the sum of Thirty-four Dollars.

Dated this 17 day of August, 1917.

BOURQUIN,
Judge.

[Endorsed]: Title of Court and Cause. Decree. Filed and entered Aug. 17, 1917. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy.

[20] And thereafter, on the 30th day of August, 1917, Assignment of Errors was filed herein, which is as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

LAURA A. BOOMER,

Plaintiff,

vs.

JAMES H. ROWE,

Defendant.

Assignment of Errors.

Now comes the plaintiff above-named by his solicitors and says: That in the decision of the said cause of the 1st day of August, A. D. 1917, the Court erred in the following particulars; The Court erred in finding that Salmon Land Company had not been dissolved and in thereby dismissing the action.

WHEREFORE, the said plaintiff, Laura A. Boomer, prays that the said decree of said District Court of the United States for the District of Montana, be reversed.

JOHN O. DAVIES,
MAURY & WHEELER,
Solicitors for Plaintiff.

Service of the above assignment of errors admitted

and copy thereof received this 30 day of August, 1917.

J. A. POORE,
Solicitors for Defendant.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed Aug. 30, 1917. Geo. W. Sproule, Clerk. By H. H. Walker, Deputy.

JOHN O. DAVIES,
MAURY and WHEELER,
Attorneys for Plaintiff.

[21] And thereafter, on the 30th day of August, 1916, Petition for Allowance of Appeal was filed herein, which is as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

LAURA A. BOOMER,

Plaintiff,

vs.

JAMES H. ROWE,

Defendant.

Petition for Allowance of Appeal.

The above-named plaintiff, Laura A. Boomer, conceiving herself aggrieved by the decree entered in the above-entitled court on the 17th day of August, 1917, in the above-entitled cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herewith, and she prays that an appeal be allowed

and that a citation issue as provided by law, and that a transcript of the records and proceedings upon which said decree was based duly authenticated may be sent to the said Circuit Court of Appeals for the Ninth Circuit, and your petitioner further prays that a proper order touching the security to be required by her to effect the appeal be made.

JOHN O. DAVIES,
MAURY & WHEELER,
Attorneys for Plaintiff.

The foregoing petition is hereby granted, and the [22] appeal is hereby allowed this 30 day of August, 1917, and the bond on appeal is hereby fixed in the sum of 300 Dollars.

BOURQUIN,
District Judge.

Service of the foregoing petition for appeal and allowance thereof and copy acknowledged as received this 30th day of August, 1917.

J. A. POORE,
Solicitors for Defendant.

[Endorsed]: Title of Court and Cause. Petition for Allowance of Appeal. Filed Aug. 30, 1917. Geo. W. Sproule, Clerk. By H. H. Walker, Deputy.

JOHN O. DAVIES,
MAURY and WHEELER,
Attorneys for Plaintiff.

[23] And thereafter, on the 30th day of August, 1916, Bond on Appeal was filed herein, which is as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

LAURA A. BOOMER,

Plaintiff,

vs.

JAMES H. ROWE,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Laura A. Boomer, as principal, and Andrew J. Davis and J. S. Dutton, as sureties, are held and firmly bound unto James H. Rowe, in the sum of Three Hundred Dollars, the payment of which well and truly to be made we bind ourselves jointly and severally and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals this 29th day of August, 1917.

WHEREAS, the above-named plaintiff has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse a decree rendered and entered in the above-entitled cause in the United States District Court, for the District of Montana on the 29th day of August, 1917.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Laura A.

Boomer, plaintiff [24] shall prosecute her said appeal to effect and shall answer all damages and costs that may be awarded against her, if she fails to make good her plea, then the above obligation is to be void, otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, we have hereunto set our hands this 29th day of August, 1917.

LAURA A. BOOMER,

Per J. O. DAVIES,

Principal.

ANDREW J. DAVIS.

J. S. DUTTON.

State of Montana,

County of Silver Bow,—ss.

Andrew J. Davis and J. S. Dutton, sureties on the foregoing bond, being severally sworn, each for himself, says: That he is a resident and freeholder within this State, and is worth the sum specified in the foregoing bond as the penalty thereof over and above all his just debts and liabilities and exclusive of property exempt from execution.

ANDREW J. DAVIS.

J. S. DUTTON.

Subscribed and sworn to before me this 29th day of August, 1917.

[Notarial Seal]

J. A. POORE,

Notary Public for the State of Montana Residing at
Butte, Montana.

My Commission expires Dec. 29, 1918.

The foregoing bond on appeal is hereby approved this 30 day of August, 1917.

BOURQUIN,
District Judge.

Service of the foregoing bond on appeal acknowledged and approved and copy thereof received this 30 day of August, 1917.

J. A. POORE,
Solicitors for Defendant.

[25] [Endorsed]: Title of Court and Cause. Bond on Appeal. Filed Aug. 30, 1917. Geo. W. Sproule, Clerk. By H. H. Walker, Deputy.

JOHN O. DAVIES,
MAURY and WHEELER,
Attorneys for Plaintiff.

[26] *In the District of the United States, for the District of Montana.*

LAURA A. BOOMER,
Plaintiff,

vs.

JAMES H. ROWE,
Defendant.

Citation on Appeal.

The President of the United States to James H. Rowe, Defendant, and to Messrs. Jesse B. Roote, Henry C. Hopkins, Enos Alley and J. A. Poore, his Solicitors, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of

Appeals for the Ninth Circuit at the City of San Francisco, State of California within thirty (30) days from the date hereof, pursuant to an appeal filed in the United States District Court, for the District of Montana, wherein Laura A. Boomer, is appellant and James H. Rowe, is appellee, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, District Judge, of the United States in and for the District of Montana, this 30 day of August, 1917.

BOURQUIN,
District Judge.

Service of the foregoing Citation on Appeal acknowledged and copy thereof received this 30th day of August, 1917.

J. A. POORE,
Solicitors for Defendant.

[27] [Endorsed]: No. 41. In the District Court of the United States, in and for the District of Montana. Laura A. Boomer, Plaintiff, vs. James H. Rowe, Defendant. Citation on Appeal. Filed Aug. 30, 1917. Geo. W. Sproule, Clerk. By H. H. Walker, Deputy.

JOHN O. DAVIES,
MAURY and WHEELER,
Attorneys for Plaintiff.

[28] And thereafter, on the 12th day of September, 1917, Condensed Statement of Evidence was approved, certified and filed herein, which is as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

LAURA A. BOOMER,

Complainant,

vs.

JAMES H. ROWE,

Defendant.

Condensed Statement of Evidence.

Appearances for complainant, John O. Davies, Maury and Wheeler, and for defendant, Messrs. Jesse B. Roote, Henry C. Hopkins, Enos Alley and J. A. Poore.

Testimony of E. W. Whitcomb, for the Plaintiff.

[29] E. W. WHITCOMB, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

(By Mr. MAURY.)

The WITNESS.—My name is E. W. Whitcomb; I am a lawyer, reside at Salmon, Idaho, and have practiced my profession about twenty-seven years; am admitted to practice in all of the courts of Idaho and the federal court sitting in that jurisdiction. I was attorney for Laura A. Boomer in a suit in the

(Testimony of E. W. Whitcomb.)

Sixth Judicial District of Idaho in and for Lemhi County, entitled *Laura A. Boomer versus Salmon Land Company*; I commenced the proceeding and continued actively through the case until the end. I recently examined and compared certain copies of the proceedings in that cause; it was on last Wednesday. I recognize the judgment-roll, marked plaintiff's number 2; I brought it over with me and recognize it for certain reasons; it is the paper I had with me. This is the judgment-roll and I compared it with the original judgment-roll in that court, went clear through the whole of it with the assistants that I had there and it is correct; it is a correct copy of the judgment-roll in that court. I was present at a sale of certain lands of the Salmon Land Company. This is a copy of the order of sale given in that suit; I have made comparison of that with the [30] original, which I made at the same time I made the other comparison. This is the return on that sale of the sheriff of Lemhi County, Idaho, and I examined this with the original return and this is a correct copy. I was present at the sale made by the sheriff, mentioned in Exhibit Number 3. The sheriff's return states exactly what transpired there; the amount bid, as shown in there, is correct, and also the land as shown there; all the features of his return are correct; I know that positively, because I checked it up immediately after he made it; I know it for two reasons, because I checked it then and since, and the facts are set forth in this exhibit that

(Testimony of E. W. Whitcomb.)

I brought from Idaho myself. Subsequent to that sheriff's sale I procured a deed to the property for my client; this is the original deed. There has been a subsequent payment of \$659.00. I have a certified copy of a record of mortgage from the Auditor and Recorder, the mortgage on which that suit that you referred to was brought; I made a comparison of it with the record; I could not find the original mortgage. I can say further regarding this copy of the mortgage that I tried to get the original mortgage and I could not find it; I don't know where it is now, but I had the original mortgage in my office at the time I drew the complaint, and I compared the original mortgage with the complaint which I drew, and I kept a copy in my office, and to be sure that this was right I compared it with the copy which I had. [31] I found on the records of Lemhi County and in the custody of the Auditor and Recorder, an instrument purporting to be a copy of a directors' meeting of the Salmon Land Company and have a copy of it with me, which I compared with the record after it was taken off, which is true and correct. I have never had any transaction with Mr. Rowe on the promissory note which you hand me; I was attorney for the collection of the note. The deficiency judgment shows exactly the amount due on this note; the \$659.00 was paid afterwards; the instrument of which I am speaking is Plaintiff's Exhibit 5. There was a payment made there after the property was sold, which is shown on this exhibit, which amounted

(Testimony of E. W. Whitcomb.)

at that time to \$659.39; that was by an officer of the court who had this property in charge, and that is the return he made; so far as I have been concerned with the note that sum of \$659.39 has been paid; the papers show there was a bid of some twenty thousand odd dollars for the property.

Mr. ROOTE.—We admit the note.

Cross-examination.

(By Mr. ROOTE.)

The WITNESS.—I was present at the sale of the land under the foreclosure; I bid it in for my client, Laura A. Boomer, the plaintiff in this suit; I was her attorney in the foreclosure, [32] and I bid in the property at the sheriff's sale for her, and had the sheriff make a deed to her, that is the way I remember it; I know the vicinity where this land is; I don't know the land itself, but I know about where it is. It would only be a guess on my part whether this is the same land that Mrs. Boomer previously deeded to the Salmon Land Company; if I drew the mortgage I have forgotten it. Your client might tell you better than I can whether the Salmon Land Company bought a farm or ranch from Mrs. Boomer and gave her this note in payment for the balance of the purchase price, and this mortgage. I cannot remember those things; I know that this land belonged to Peter McKenny originally and I know it was transferred, but I don't know whether I was a party to that transfer or not. The exact method of the transfer I cannot recall. It is in my mind now that

(Testimony of E. W. Whitcomb.)

I did not draw the papers, but I might have; I would not say that I did not; I don't remember ever drawing them at all, still I might have. I know that the land did belong to Peter McKenny and that he occupied it, and I know that he owed Mrs. Boomer and gave her a note and mortgage, and when Peter McKenny sold it to the Salmon Land Company, I think they assumed this mortgage, but I could not swear to it; I think the Land Company took up the old one and gave her a new one—that is my understanding. In making the comparisons of these various copies of documents from the records in Lemhi County, I compared some of the papers [33] myself, and part of them I went over with the deputy recorder there; one of us would read and the other would follow; I think we took turns about; he would read a while and I would follow on the other paper and then I would read and he would follow. It would be hard for me to tell which of those documents we compared in that manner, but some of them we did, and some of them even after they were read over I checked them up alone—certain portions of the land I checked.

Testimony of James H. Rowe, for Plaintiff.

[34] JAMES H. ROWE, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

(By Mr. MAURY.)

The WITNESS.—I am the defendant in this case;

(Testimony of James H. Rowe.)

I have been an officer of the Salmon Land Company; I don't remember exactly for how long; since it was organized—about the date of that note. I was one of the parties who signed the note; I signed it as secretary of the corporation, and gave it to Mr. Boomer, husband of Laura A. Boomer, I think; I understood at the time that he was her agent. I cannot tell how much of the note has been paid; I think the amount stated in the suit is correct—in her bill of complaint; I have not checked up the amount but I think it is substantially correct. That all of the note has been paid except the sum of \$4,963.10, with interest—I think that is approximately correct—with interest from the 31st day of July, 1914. I don't know anything about that payment of \$659. That is the first I ever heard of it, to-day. It is not a payment by our authority; I don't know for what purpose it was paid; I never heard of it until a few minutes ago. I have the records of the Salmon Land Company here, also a copy of the articles of incorporation. I was present at a meeting of April 19, 1910, authorizing the mortgage— [35] a meeting of the board of directors. Pages 15, 17 and 19 of this book are correct minutes of that meeting.

Mr. ROOTE.—We admit the making of that note. It is all in your complaint and it is admitted; it shows that there was a meeting and that they authorized this transaction by all of the directors, of which Mr. Rowe was one.

Mr. MAURY.—Very well.

(Testimony of James H. Rowe.)

The WITNESS.—The Salmon Land Company is not possessed of any property; it has not had any property since this property was sold in Lemhi County, Idaho—I would say at the date alleged in the complaint. In the annual statements since then we mention a debt of the corporation of \$5,000, that the amount of existing debts of said corporation is \$6,500.00; that is in the statement of date Jan. 10, 1916; that is this deficiency judgment and the accrued interest, and the costs of that suit; there are no other debts except money that is owed to me personally that I make no claim for.

Mr. MAURY.—Is it admitted, Mr. Roote, that there has never been any subscription to stock greater than \$10,000?

Mr. ROOTE.—I think so.

Cross-examination.

(By Mr. ROOTE.)

The WITNESS.—I am acquainted with H. H. Boomer, the husband [36] of Mrs. Boomer, who lives in Spokane. In this whole transaction the Salmon Land Company did business with an agent of Mrs. Boomer, who was H. H. Boomer. The land in question was sold to a syndicate in Butte by Peter McKenny, an associate of Boomer's and the price was agreed on, and we paid approximately ten thousand dollars, plus a mortgage that then existed on the property, a loan that had been made by Boomer to McKenny.

Mr. MAURY.—That is not in the pleadings—no

(Testimony of James H. Rowe.)

contention of that kind, nor is the authority of any agent of Mrs. Boomer shown sufficient for the transaction, and it would be absolutely immaterial.

Mr. ROOTE.—I would like to have Mr. Rowe explain the whole transaction.

The COURT.—You may proceed. If the evidence is not entitled to any weight it will not be given any.

Mr. MAURY.—We are not assenting to it. We are not to be deemed as assenting to it.

The COURT.—Certainly.

The WITNESS.—We paid to McKenny and Boomer approximately ten thousand dollars—I don't remember the exact amount; it was figured out at so much per acre, and we assumed the indebtedness that McKenny owed to Boomer. This is one of the several transactions that we had, and the development that we expected to ensue did not occur in the Salmon land and we had several talks with the stockholders of the syndicate [37] and with Boomer, and I told Mr. Boomer, and in fact he agreed in front of the Finlen Hotel that there need be no redemption.

Mr. MAURY.—We object, that that was not in writing.

The WITNESS.—I think I have it in writing, but I will have to hunt it up.

Mr. MAURY.—We specifically make that objection, a transfer of land must be in writing.

Mr. ROOTE.—It was with reference to a foreclosure.

(Testimony of James H. Rowe.)

The COURT.—Objection overruled.

(Exception noted by plaintiff.)

The WITNESS.—In any event we made no appearance in this case whatever—in this case in Lemhi County. Mr. Boomer told me Mr. Whitcomb suggested the record would be clearer if there was a foreclosure. Another separate company had a very bitter dispute later. I am trying to explain why we have the difference of opinion now. An attorney, A. C. Sherry down there, appeared without any authority from us, and in this case had no authority from the Salmon Land Company to appear; we did not think there was any necessity for it, and it was only long afterwards that I learned of the fact that this deficiency judgment was taken, and that I was sued personally. I knew nothing of any deficiency judgment prior to being sued. My transaction in buying the land was all with Mr. Boomer, representing his wife. We met in front of the Finlen Hotel—these matters run over several months, [38] and I had a talk about the matter; there were two corporations; the other corporation contested the case very seriously and was a much larger case. I told Boomer that the people who were interested in this syndicate would abide by my advice, and that I would suggest that we simply return the land and that they were ten thousand dollars ahead; he said that was all right, and that he would have it done that way, and in carrying out that understanding with him we turned over possession of the ranch to

(Testimony of James H. Rowe.)

him as agent of his wife; I don't know how long he had possession of the land before he commenced the foreclosure proceedings, but we had nothing to do with the property afterwards, and his man McKenny put someone in charge there; they had someone appointed trustee under their Idaho law. The only thing further that I knew of it was when I was served long afterwards in this suit personally; we had been resting secure in the belief that they had agreed to take the land back and wipe the sale off; this suit was a couple of years afterwards. Nobody made any claim on me. The matter was talked over several times with Boomer; in fact, I think I can find letters to that effect.

Redirect Examination.

(By Mr. MAURY.)

The WITNESS.—I don't remember exactly when the original [39] suit was started; I was talking about the suit to foreclose; I have been sued twice in this court; I think the first suit was two years ago last January—about two years and a half ago. When it came time to file the annual statement I saw Mr. Roote and he had some correspondence with Whitcomb, and as there was a deficiency judgment he told me we had better put it in our annual report. Attorney Roote told me I had better put in approximately that amount—\$5,075.00. I had a man named Hall who attended to all of the Salmon land business and I guess I sent to Salmon for the information; I was satisfied that that was correct; that was the only debt that was alluded to—this deficiency judgment.

**Testimony of E. W. Whitcomb, for the Plaintiff
(Recalled).**

[40] E. W. WHITCOMB, a witness heretofore called and sworn on behalf of the plaintiff, recalled for further direct examination,
(By Mr. MAURY.)

The WITNESS.—The title of that court is the Sixth Judicial District Court of the State of Idaho, for the County of Lemhi, and it is a court of record and has a seal and a clerk; I know the clerk and his deputies. I am acquainted with the signature of W. W. Simmons; I have seen him write frequently; that is his genuine signature. That is W. W. Simmons' signature on the certificate of Plaintiff's Exhibit 2. That is the seal of that court. That is W. W. Simmons' signature where it appears on all of plaintiff's exhibits, and that is the seal; he is ex-officio recorder of the county. The duties of taking care of court papers and deeds are in the hands of the same officer; he is recorder and the clerk of that court. That is the genuine signature of W. W. Simmons on Plaintiff's Exhibit 6 and also the seal of that court; and that is his signature and the seal of the court on Plaintiff's Exhibit 3.

Cross-examination.

(By Mr. ROOTE.)

The WITNESS.—I was attorney for the plaintiff in the case in the Idaho court entitled Laura A. Boomer, plaintiff, [41] against Salmon Land Company et al., and was perfectly familiar with the

(Testimony of E. W. Whitcomb.)

proceedings in the case at the time, and I think I am now; there might be something I would want to refresh my memory on; the judgment was one by default as I recall it; the demurrer was filed and overruled and they refused to answer further. The Salmon Land Company appeared in that case. I compared those records a few days ago. The decree shows that there was a default judgment, but the Salmon Land Company appeared there by Mr. A. C. Sherry; I cannot remember whether that was upon the understanding that that was to save the cost of the publication of summons.

Mr. MAURY.—We object to that as not plead in the answer, and no claim is made in the answer that there was any extraneous agreement.

(Objection overruled.)

Mr. MAURY.—We make this objection merely to show that we do not consent.

The WITNESS.—I am under the impression that the understanding was that Mr. Sherry would file a demurrer for the Land Company, that the demurrer would not be argued, that it would be overruled and then no answer would be put in—that he was to make an appearance to save the expense of service, and the record shows that when the demurrer was overruled he failed or refused to file an answer; as a matter of fact he did not file an answer, but I think there was another reason for it; there was another case pending in [42] which Mr. Rowe was interested, and that both companies had no existence

(Testimony of E. W. Whitcomb.)
in that state, and that he could not do anything further if he wished to; that is my impression. Then the court appointed a trustee to represent the non-resident corporation, and the trustee filed a demurrer which was not argued; the demurrer was overruled, leave granted to answer by the next day and he refused to answer; I can remember that; I can tell the circumstances from that as I got it from the trustee.

Testimony of H. H. Boomer, for the Plaintiff.

[43] H. H. BOOMER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

(By Mr. MAURY.)

The WITNESS.—My name is H. H. Boomer; I am the person spoken of as the agent of Mrs. Laura Boomer; I am her husband. She is a citizen of the State of Washington and has been since this suit was commenced. Before this sheriff's sale, my wife did not own that land or any part of it.

Cross-examination.

(By Mr. ROOTE.)

The WITNESS.—Before the purchase of this land by the Salmon Land Company it was owned by Mr. McKenny, and Mr. McKenny had given and executed a mortgage to my wife for about the same amount that is in the mortgage in this case. Mr. McKenny owned the land and had given to Mrs. Boomer a mortgage for a large sum of money, some-

(Testimony of H. H. Boomer.)

thing like twenty thousand dollars, and that the Salmon Land Company that Mr. Rowe represented, and his associates, bought the ranch from Mr. McKenny and agreed to pay Mrs. Boomer,—that they were to assume the mortgage; they took [44] up the mortgage that McKenny gave and gave us a new note and mortgage.

[45] That there were introduced in evidence seven (7) exhibits, all being documentary and numbered respectively from one (1) to seven (7).

Exhibit One consists of certified copy of the articles of incorporation of Salmon Land Company. It was subscribed by the incorporators among which was the defendant, James H. Rowe, on April 8th, 1910, two other directors were named as incorporators making three in all. The name of the corporation was set forth there as being Salmon Land Company. Among other purposes it was set forth that it was formed to buy, own, sell, mortgage, and lease lands, real estate, water rights, etc., and to engage in any other business that may be considered necessary; its principal place of business was therein described as Butte, Silver Bow County, Montana; its term of existence was to be twenty (20) years; the number of its directors was to be three; the amount of the capital stock was set forth as being Fifty Thousand (\$50,000.00) Dollars, divided into Five Thousand (5,000) shares of the par value of Ten (\$10.00) Dollars, per share; the amount actually subscribed was, William Lawlor, one (1) share fully paid; James H. Rowe, one (1) share, fully

paid; Jesse M. Hall, one (1) share fully paid.

Exhibit One also contained the Annual Report of the said corporation filed January 20th, 1912. It set forth its name and principal place of business; its capital [46] stock was Fifty Thousand (\$50,000.00) Dollars; the amount actually paid in in cash Ten Thousand (\$10,000.00) Dollars; the amount of existing debts of the corporation is Twenty Thousand Five Hundred Twenty and 75/100 (\$20,520.73) Dollars; that the names of the directors were J. K. Heslet, James H. Rowe and Charles Cady; that James H. Rowe was its Secretary and Treasurer. This report is not signed by James H. Rowe.

Said Exhibit One also contained Annual Report filed January 20th, 1913, of the said corporation. There was no change in the report except that the debts were placed at Twenty-three Thousand Three Hundred Ninety-three and 50/100 (\$23,393.50) Dollars, and its directors were George McCutcheon, Charles Caddy and J. H. Rowe. Mr. Rowe, is set forth as Secretary and Treasurer.

Exhibit One also contained Annual Report filed January 10th, 1915, the report is the same as the other reports except that the amount of existing debts is placed at Five Thousand Seventy-five (\$5,075.00) Dollars, and Jesse M. Hall, had succeeded George McCutcheon on the Board of Directors.

Exhibit One also contained Annual Report of the 15th day of January, 1916, filed with the County Recorder. It is the same as the other reports, ex-

cept that there was the following words added, the amount of capital stock issued in payment of property is none; the existing debts placed at Six Thousand (\$6,000.00) Dollars; and the [47] following words were placed in this report, "This corporation has ceased to be a going concern and has ceased (to?) voluntarily incur financial obligations because of its insolvency." This annual report of Jan. 15, 1916, is not signed by James H. Rowe.

Exhibit One also contained annual statement of Salmon Land Company, filed January 10th, 1916, the directors are Charles Cady, Jesse M. Hall, James H. Rowe; the amount of existing debts are placed at Six Thousand Five Hundred (\$6,500) Dollars, and the following words appear in it over the signature of James H. Rowe, "This corporation has ceased to be a going concern and has ceased to voluntarily incur financial obligations because of its insolvency."

All of the said papers in Exhibit One were duly certified to be true and correct copies of papers on file with the County Clerk and Recorder of Silver Bow County, Montana, and bore the County Seal, the seal of his office.

Exhibit Two was a certified copy of a Judgment-roll in the cause of Laura A. Boomer, Plaintiff, vs. Salmon Land Company. All of the papers in the Judgment-roll were entitled in the District Court of the Sixth Judicial District of Idaho in and for the County of Lemhi, Laura A. Boomer, Plaintiff, vs. Salmon Land Company, and F. A. Bennett, Defendants (it bore no signature or attestation of any

Judge), but it bore the seal on the certificate of the Clerk of the said District Court and the certificate recited, "That it is a full, true and complete copy of the Judgment-roll in [48] said case." Each paper in this exhibit was objected to by defendant for the reason that it bears no certificate of the Judge that the person certifying thereto is or was the clerk or that the certificate of such clerk is in due form.

That the first paper in the said exhibit was a complaint alleging the debt and note to be the sole and separate property of the plaintiff; incorporation of Salmon Land Company; and a copy of a promissory note for Twenty Thousand Five Hundred Twenty and 73/100 (\$20,520.73) Dollars, of date April 14th, 1910, payable at First National Bank of Butte, Montana, to the plaintiff with interest at eight (8%) per cent per annum and signed Salmon Land Company by Charles Cady, President, and James H. Rowe, Secretary, it recited that a mortgage deed had been given, the interest had not been paid on the note and that the note was due for the entire sum. It asked foreclosure and a deficiency judgment. An ordinary form of mortgage was attached as an exhibit, reciting that it was optional with the mortgagee to consider the whole of the principal sum expressed in said note as immediately payable and due if the interest was not paid. The exhibit also contained a general demurrer of the defendant in said suit. The Salmon Land Company by Attorney A. C. Cherry, on the grounds that the complaint does not state facts sufficient to constitute a cause of action; it recites an order overruling said demur-

rer; there appears in addition an amended complaint in the said Judgment-roll; it recites a judgment foreclosing the said mortgage, finding that conditions thereof were not fulfilled; that the defendant Salmon Land Company [49] was indebted together with all the interest from April 14th, 1911, and an attorney's fee and awards judgment for the sum of Twenty-four Thousand Eight Hundred Ninety-eight and 50/100 (\$24,898.50) Dollars, and Two Hundred Fifty (\$250.00) Dollars attorney's fee, and decrees that if the amount bid for the property be not sufficient to pay the judgment that the Sheriff certify such deficiency to the Clerk and that it be docketed as a personal judgment; it shows that the judgment was signed December 30th, 1913, filed January 3, 1914.

Exhibit Three is a return of the Sheriff of Lemhi County, Idaho, showing that there was a deficiency due on the said judgment on January 31st, 1914, of Four Thousand Nine Hundred Sixty-three and no/100 (\$4,963.10) Dollars after selling all the property described in the mortgage. It shows an order of sale under said judgment and sets forth a copy of the decree and is certified by the Clerk of the said District Court of the Sixth Judicial District of Idaho, with the seal of the court, but without any signature of the Judge.

Exhibit Four is a Sheriff's Deed on Foreclosure, conveying to Laura A. Boomer by Thomas J. Stroud, Sheriff of Lemhi County, all of the land described in the mortgage; it is of date February 27, 1915, and

with the proper number of revenue stamps of the United States on it.

Exhibit Five shows that it is a certified copy of a deficiency [50] judgment docketed by the Clerk of the said District Court; it bears the seal of the Court; it has no certificate of the Judge; it shows deficiency judgment entered against Salmon Land Company in favor of Laura A. Boomer of date February 4th, 1914, amount Four Thousand Nine Hundred Sixty-three and 01/100 (\$4,963.01) Dollars, and a partial satisfaction of Six Hundred Fifty-nine and 39/100 (\$659.39) Dollars, filed July 6th, 1915.

Exhibit Six is a certified copy of the same mortgage from Salmon Land Company to Laura A. Boomer, said mortgage has been heretofore set forth.

Exhibits 3, 5 and 6 were objected to for the same reasons as Exhibit 2 above set forth.

Exhibit Seven is a copy of the minutes of a meeting of the Board of Directors of Salmon Land Company; it is certified to have been filed in the Office of the County Recorder in Lemhi County, Idaho, over the signature of James H. Rowe, Secretary, and recites among other things that the mortgage of Twenty Thousand Five Hundred Twenty and 75/100 (\$20,520.73) Dollars was authorized by the said Board of Directors; all of them voted in favor of it, and to secure a promissory note of the Company in the like amount.

CERTIFICATE.

I, George M. Bourquin, Judge of the above-entitled court, do hereby certify that the foregoing statement is true, complete and properly prepared;

that in so far as it purports to contain the substance of the exhibits it contains all of such substance as is material in any wise to a full determination [51] of this cause on appeal, though abbreviated, it contains in substance all of the evidence introduced at said trial and the said statement is hereby approved and ordered filed as part of the record for the purpose of the appeal herein.

Dated this 12 day of Sept., A. D. 1917.

BOURQUIN,

Judge.

The foregoing record may be settled as true and correct.

J. A. POORE,

Atty. for J. H. Rowe.

[Endorsed]: Title of Court and Cause. Condensed Statement of Evidence. Recd. at Clerk's Office, Aug. 30, 1917. Geo. W. Sproule, Clerk. By H. H. Walker, Deputy. Approved and certified and filed Sept. 12, 1917. Geo. W. Sproule, Clerk.

JOHN O. DAVIES,

MAURY and WHEELER,

Solicitors for Complainant.

[52] And thereafter, on the 30th day of August, 1917, Praeceptum for Transcript of Record was filed herein, which is as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

LAURA A. BOOMER,

Plaintiff,

vs.

JAMES H. ROWE,

Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of record to be filed in the *United Circuit Court of Appeals* for the Ninth Circuit, pursuant to an appeal allowed in the above-entitled cause and to incorporate into such transcript of record the following and no other papers or exhibits, to wit:

1. The plaintiff's bill of complaint.
2. The defendant's motion to dismiss bill of complaint.
3. The answer to the bill of complaint.
4. The decision of the Court by memorandum opinion filed on the 1st day of August, 1917.
5. The decree of the Court rendered pursuant thereto.
6. Plaintiff's assignment of errors.
7. The bond on appeal.
8. The citation on appeal, with admission of service.

[53] 9. The condensed statement of evidence.

And that the same be duly certified by you as required by law and the rules of the court; and that you further state in your certificate under seal, cost of the record and by whom paid.

JOHN O. DAVIES,
MAURY and WHEELER,
Attorneys for Plaintiff.

Service of the foregoing Praecipe acknowledged and copy thereof received this 30 day of August, 1917.

J. A. POORE,
Attorneys for Defendant.

[Endorsed]: Title of Court and Cause. Praecipe for Transcript of Record. Filed Aug. 30, 1917. Geo. W. Sproule, Clerk. By H. H. Walker, Deputy.

[54] Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 54 pages, numbered consecutively from 1 to 54, inclusive, is a true and correct transcript of the pleadings, decree, opinion of the Court, and all other proceedings in said cause required to be incorporated in the record on appeal therein by the praecipe of the appellant for said record on appeal, including said praecipe, and of the whole thereof, as appears from

the original records and files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Fifteen 50/100 Dollars and have been paid by the appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Butte, Montana, this 21st day of September, 1917,

[Seal]

GEO. W. SPROULE,

Clerk United States District Court, District of Montana.

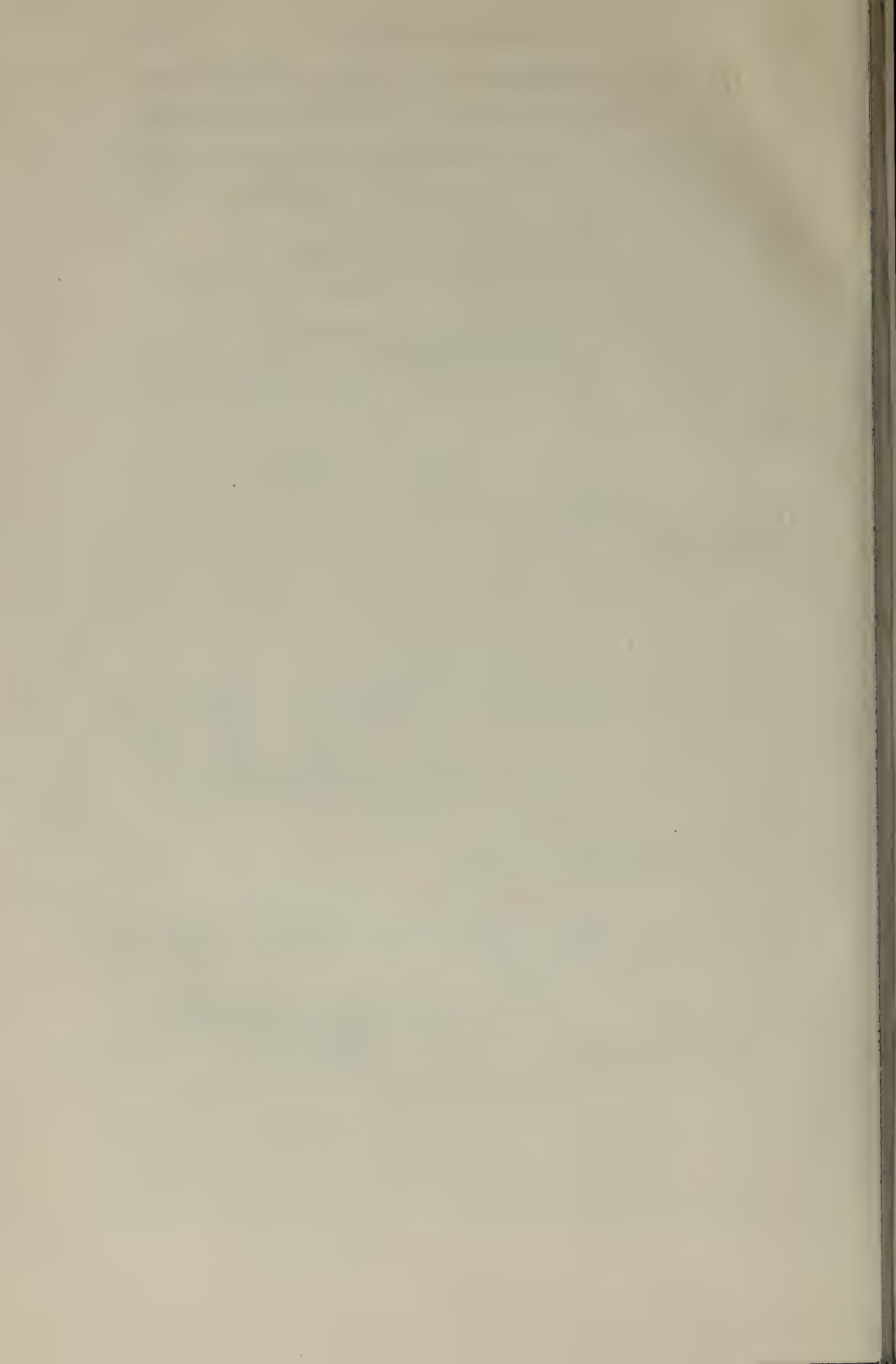
[Endorsed]: No. 3053. United States Circuit Court of Appeals for the Ninth Circuit. Laura A. Boomer, Appellant, vs. James H. Rowe, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed September 25, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



5055

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE NEW YORK CENTRAL RAILROAD COM-
PANY, a Corporation,

Plaintiff in Error.

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corpo-
ration,

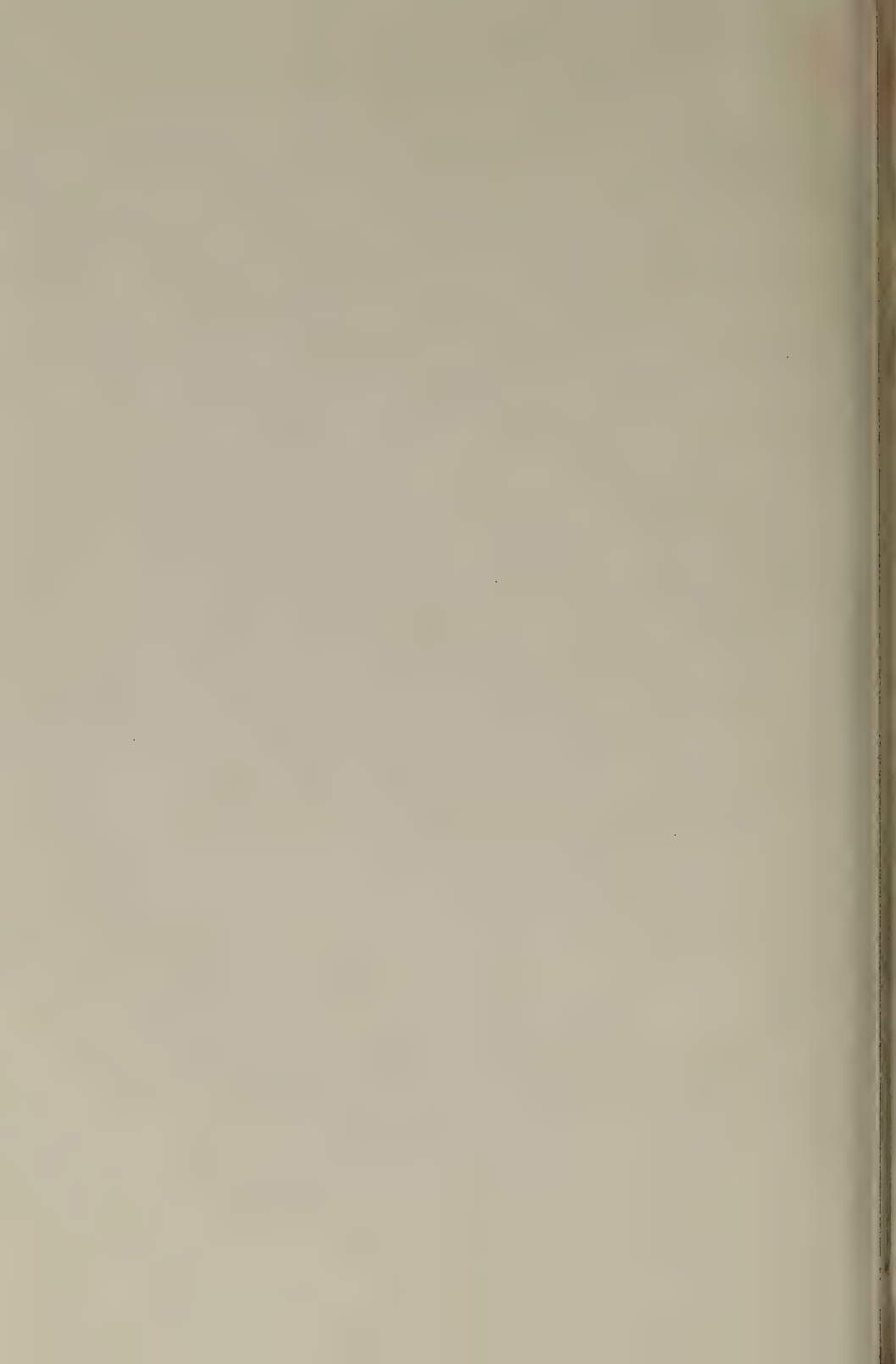
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.

Filed

OCT 1 - 1917



No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE NEW YORK CENTRAL RAILROAD COM-
PANY, a Corporation,

Plaintiff in Error.

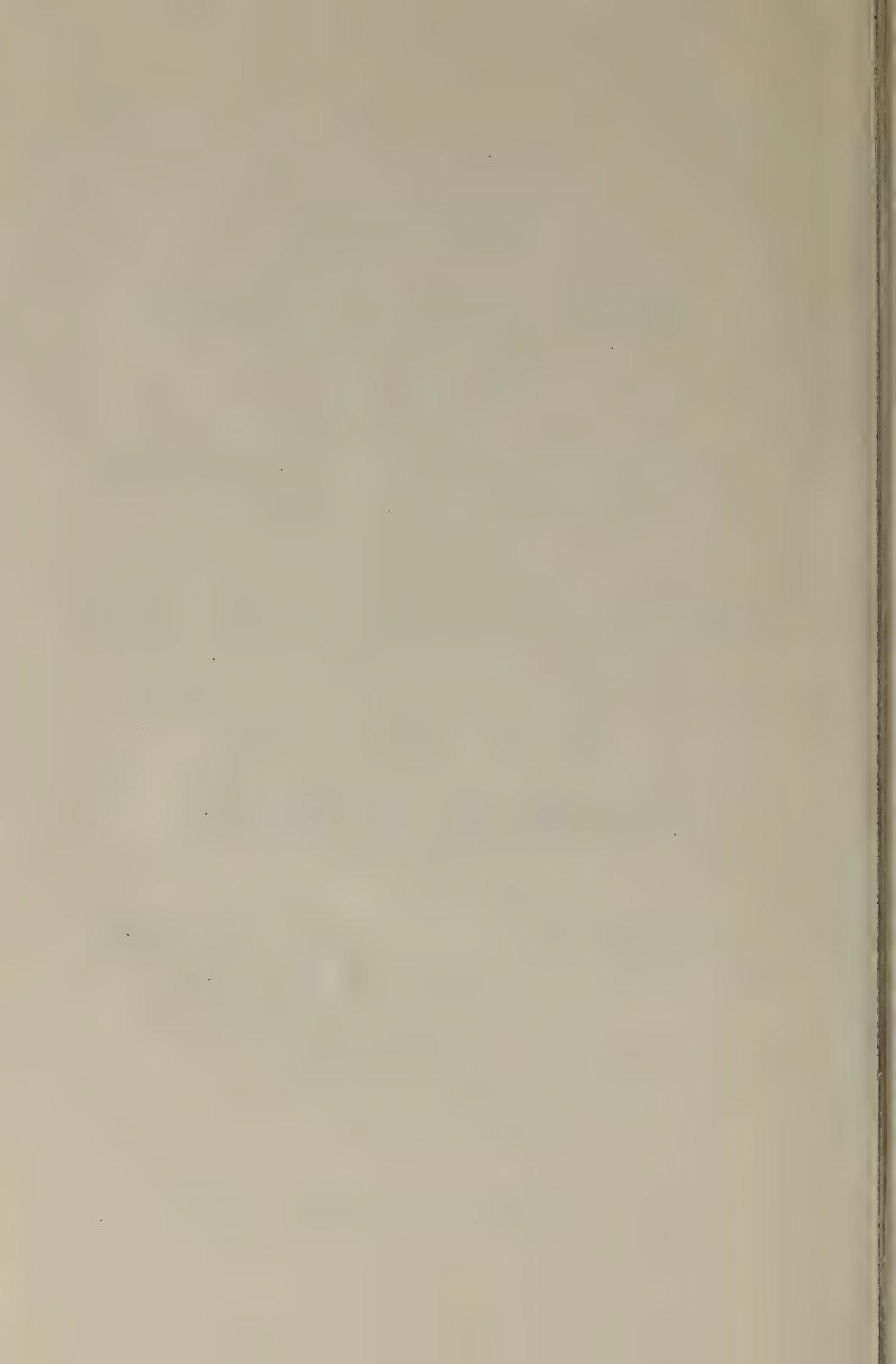
vs.

MUTUAL ORANGE DISTRIBUTORS, a Corpo-
ration,

Defendant in Error.

Transcript of Record.

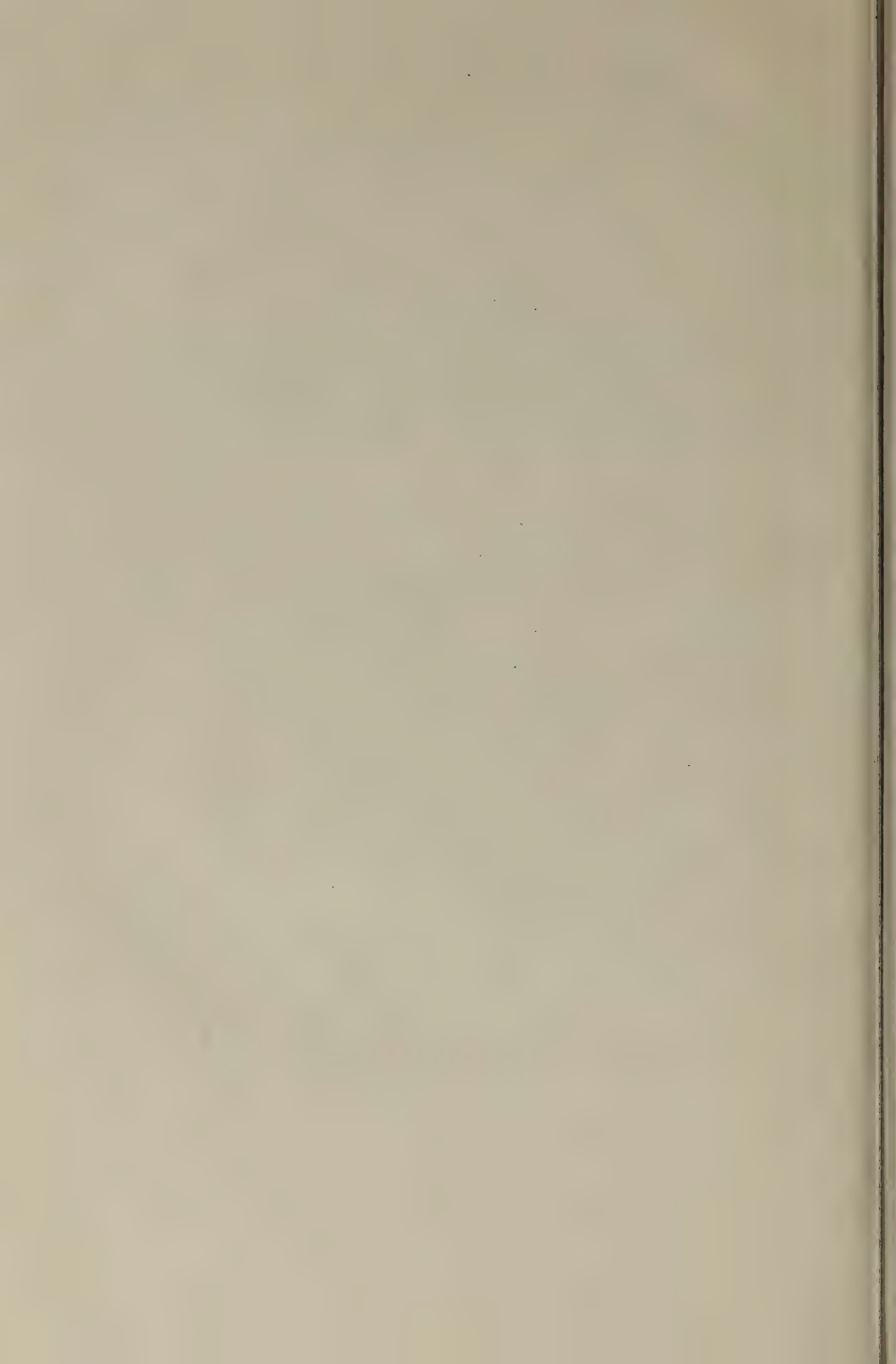
Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.



INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	PAGE
Assignment of Errors.....	30
Citation on Writ of Error.....	2
Clerk's Certificate to Judgment Roll.....	27
Complaint	6
Exhibit A.....	11
Conclusions of Court.....	28
Demurrer to Complaint.....	22
Judgment	25
Minute Order.....	24
Names and Addresses of Attorneys.....	1
Order Allowing Writ of Error.....	36
Petition for Writ of Error.....	29
Praecipe for Transcript of Record.....	38
Return on Service of Writ.....	21
Summons	20
Writ of Error.....	3



Names and Addresses of Attorneys.

For Plaintiff and Appellant:

E. W. CAMP, U. T. CLOTFELTER, PAUL
BURKS, M. W. REED, ROBERT BREN-
NAN, Esqs., Kerckhoff Building, Los Ang-
eles, California.

For Defendant and Appellee:

WARD CHAPMAN, L. M. CHAPMAN, Esqs.,
B. F. Coulter Building, Los Angeles, Cali-
fornia.

*In the District Court of the United States, Southern
District of California, Southern Division.*

THE NEW YORK CENTRAL RAILROAD COM-
PANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corpora-
tion,

Defendant.

No. 543 Civil.

Citation on Writ of Error.

United States of America, to Mutual Orange Dis-
tributors, a Corporation, Defendant in Error,
Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, state of California, thirty (30) days from and after the day this citation bears date, pursuant to the writ of error filed in the clerk's office of the United States District Court for the Southern District of California, Southern Division, sitting at Los Angeles, wherein The New York Central Railroad Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Oscar A. Trippet, judge of

the United States District Court, this 3d day of August, 1917.

OSCAR A. TRIPPET,
United States District Judge.

[Endorsed]: Original. No. 543 Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. The New York Central R. R. Co., a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Citation on writ of error. Received copy of the within citation this 3rd day of August, 1917. Ward Chapman, L. M. Chapman, attorney for defendant. Filed Aug. 3, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. E. W. Camp, Paul Burks, U. T. Clotfelter, M. W. Reed, Robert Brennan, Kerckhoff Building, Los Angeles, California, telephone: Main 2980, attorneys for plaintiff.

*In the District Court of the United States, Southern
District of California, Southern Division.*

THE NEW YORK CENTRAL RAILROAD COM-
PANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corpora-
tion,

Defendant.

No. 543 Civil.

Writ of Error.

United States of America—ss.

The President of the United States, to the Hon. Oscar A. Trippet, Judge of the United States District Court for the Southern District of California, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between The New York Central Railroad Company, a corporation, plaintiff in error, and Mutual Orange Distributors, a corporation, defendant in error, a manifest error hath happened, to the damage of The New York Central Railroad Company, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the state of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief

Justice of the United States, this 3d day of August, 1917.

(Seal)

WM. M. VAN DYKE,

Clerk of the United States District Court for the
Southern District of California, Southern Division.

By CHAS. N. WILLIAMS,

Deputy Clerk.

Allowed this 3rd day of August, 1917.

OSCAR A. TRIPPET,

United States Judge.

I hereby certify that a copy of the within writ was on the 3rd day of August, 1917, lodged in the clerk's office of the said United States District Court for the Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,

Clerk of the United States District Court for the
Southern District of California, Southern Division.

By CHAS. N. WILLIAMS,

Deputy Clerk.

[Endorsed]: Original. No. 543 Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. The New York Central R. R. Co., a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Writ of error. Filed Aug. 3, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. E. W. Camp, Paul Burks, U. T. Clotfelter, M. W. Reed, Robert Brennan, Kerckhoff Building,

Los Angeles, California, telephone: Main 2980, attorneys for plaintiff.

*In the District Court of the United States, Southern
District of California, Southern Division.*

THE NEW YORK CENTRAL RAILROAD COM-
PANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corpora-
tion,

Defendant.

No. 543 Civ.

Complaint.

Plaintiff complains of defendant, and for cause of action alleges:

I.

That plaintiff is now and was at all times herein mentioned a corporation, duly organized under the laws of the state of New York, for the carriage of freight and passengers as a common carrier for hire over and by means of a line of railway extending from, among other places, Buffalo to New York City, in said state, and with respect to the shipment of oranges, hereinafter mentioned, was a connecting carrier of The Atchison, Topeka and Santa Fe Railway Company, a corporation.

II.

That defendant was at all times herein mentioned a corporation, duly organized and existing under and by virtue of the laws of the state of California.

III.

That on or about the 23rd day of January, 1913, the defendant, pursuant to a written contract, a copy whereof is hereto attached, marked Exhibit "A," hereby referred to and made a part hereof, transported over the lines of The Atchison, Topeka and Santa Fe Railway Company, a shipment of oranges consisting of 384 boxes of oranges, weighing approximately 27,648 pounds; that by the terms of said contract said oranges were to be transported to Kansas City, Missouri; that after said oranges had been consigned and received by said railway company for transportation, the defendant reconsigned said shipment and property to Wichita, Kansas; that the defendant, at the time of the making of said contract, agreed to pay the freight charges legally due therefor; that The Atchison, Topeka and Santa Fe Railway Company, the initial carrier named in said contract, agreed for itself and connecting lines of railway to transport said shipment of oranges; that on or about said 23rd day of January, 1913, defendant delivered to The Atchison, Topeka and Santa Fe Railway Company at Cucamonga, California, for shipment over its said line of railway to Kansas City, Missouri, pursuant to the terms of said contract, said 384 boxes of oranges; that thereafter defendant reconsigned said shipment to Wichita, Kansas.

IV.

That The Atchison, Topeka and Santa Fe Railway Company, in the course of its business as a common carrier, received said shipment, and said company and its connecting lines, within a reasonable time there-

after, transported said shipment to Wichita, Kansas, and to the other points hereinafter mentioned, and upon the arrival of said shipment at Wichita, Kansas, on or about January 29th, 1913, tendered said shipment and property to the defendant; thereafter defendant reconsigned said shipment, on or about February, 5th, 1913, to Des Moines, Iowa, and there, on or about February 11th, 1913, said shipment was tendered to the defendant; thereafter defendant reconsigned said shipment, on or about February 15th, 1913, to Clinton, Iowa; that said shipment was, upon arrival at said Clinton, Iowa, reconsigned by defendant to Grand Rapids, Michigan, where said shipment was again tendered and offered for delivery to defendant on or about February 24th, 1913; thereafter defendant reconsigned said shipment, on or about February 27th, 1913, to Detroit, Michigan, where said shipment was tendered and offered for delivery to defendant on or about March 3rd, 1913; thereafter defendant reconsigned said shipment, on or about the 8th day of March, 1913, to Buffalo, New York; that upon the arrival of said shipment at said Buffalo, New York, defendant, on or about March 11th, 1913, again ordered and reconsigned said shipment to Albany, New York.

That the plaintiff, in the course of its business as such common carrier, and as a connecting line for The Atchison, Topeka and Santa Fe Railway Company, and its other connecting lines, received said shipment at said Buffalo, New York, on or about March 11th, 1913, and within a reasonable time thereafter transported said shipment to Albany, New York;

that said shipment was upon arrival at said Albany, New York, reconsigned by defendant to New York City, where said shipment was, on or about the 24th day of March, 1913, placed for delivery at Duane street, in the city of New York, where, upon inspection, it was discovered that said oranges were unfit for human consumption, and thereupon the board of health of the city of New York condemned the entire shipment of oranges and ordered said oranges destroyed.

V.

Plaintiff further shows to the court that under and in accordance with the terms of said contract, and under and in accordance with the tariffs and classifications applicable thereto, and in force and effect and on file with the Interstate Commerce Commission at the time of the receipt of transportation of said shipment, the freight, refrigeration, car service charges and other lawful expenses for the transportation thereof by plaintiff and said connecting carriers legally due upon said shipment were and are the sum of \$401.27, itemized as follows:

Freight from Cucamonga to Chicago,	\$238.46
Car service at Wichita,	5.00
Car service at Des Moines,	2.00
Freight from Chicago to Grand Rapids,	6.91
Car service at Grand Rapids,	1.00
Freight from Grand Rapids to Detroit,	16.87
Car service at Detroit,	4.00
Freight from Detroit to Buffalo,	26.71
Freight from Buffalo to Weehawken, N. J.,	29.00
Car service at Albany,	1.00

Reconsigning charge at Buffalo,	3.00
Freight from Weehawken, N. J., to Duane street, New York City,	15.00
Charge for dumping shipment,	52.32

Total\$401.27

which said total amount, under the constitution and laws of the United States, the plaintiff was and is bound to collect, and which said amount is justly due the plaintiff from the defendant, but defendant has refused and still refuses to pay the same, or any part thereof, although often requested so to do; that under and in accordance with the terms and provisions of an Act of Congress approved February 4th, 1887, entitled "An Act to Regulate Commerce," and acts amendatory thereof and supplemental thereto, there is now due, owing, and unpaid by defendant to plaintiff said sum of \$401.27.

Wherefore, plaintiff prays judgment against defendant for the sum of \$401.27, with interest thereon, and costs of suit.

E. W. CAMP,
U. T. CLOTFELTER,
ROBERT BRENNAN,
Attorneys for Plaintiff.

EXHIBIT "A."

Form 18 Regular

Hall 4 14 200M 9595

Uniform Bill of Lading—Standard Form of Straight Bill of Lading Approved by the Interstate Commerce Commission by Order No. 787, of June 27, 1908.

The Atchison, Topeka & Santa Fe Railway Company

Coast Lines

Straight Bill of Lading—Original—Not Negotiable

Shipper's No.....

Agent's No.....

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading, at Cucamonga, Calif., Jan. 23rd, 1913, from Mutual Orange Distributor the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions,

whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from.....to.....
 is in cents per 100 Lbs.

..... is in cents per 100 Lbs.											IF Special per	IF Special per
IF Times 1st	IF 1st Class	IF 2d Class	IF 3rd Class	IF 4th Class	IF 5th Class	IF A Class	IF B Class	IF C Class	IF D Class	IF E Class		

(Mail Address—Not for purposes of Delivery.)

Consigned to James A. Coogan
 Destination Kansas City, State of Mo. County of.....
 Route S Fe Car Initial S F R D Car No. 4712

NO. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
-----------------	---	-----------------------------------	------------------	-----------------

384	Standard boxes Oranges	27648		
	Stand Vent			
	Note on Way Bill			

If charges are to be prepaid, write or stamp here, "To be Prepaid."

 Received \$.....
 to apply in prepayment of the charges

Permit inspection without bill lading
Deliver without bill lading on writ-
ten order of Mutual Orange Dis-
tributor's Agent.

(Stamped thereon the following:)
THIS CAR UNDER VENTILA-
TION. Put in ICE PLUGS and
close hatches when the temperature
falls below FREEZING. Open
hatches and take out ICE PLUGS
immediately the TEMPERATURE
RISES ABOVE FREEZING.

on the property de-
scribed hereon.
.....
Agent or Cashier.
Per
(The signature here
acknowledges only
the amount pre-
paid.)
Charges Advanced:
\$.....

Mutual Orange Distributor Shipper.

Per B. A. C.

..... Agent.
Per

(This bill of lading is to be signed by the shipper and agent of the carrier issuing same.)

CONDITIONS.

Section 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall

be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed

upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade, without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in a car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any document, specie, or for any articles of ex-

traordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any

vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an endorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

[Endorsed]: No. 543 Civ. In the District Court of the United States in and for the Southern District of California, Southern Division. New York Central Railroad Company, a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Complaint. Filed Jan. 20, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. E. W. Camp, Paul Burks, U. T. Clotfelter, M. W. Reed, Robert Brennan, Kerckhoff Building, Los Angeles, California, telephone: Main 2980, attorneys for plaintiff.

United States of America, District Court of the United States, Southern District of California, Southern Division.

THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a corporation,

Defendant.

Action brought in the said District Court and the complaint filed in the office of the clerk of said District Court, in the city of Los Angeles, county of Los Angeles, state of California.

Summons.

The President of the United States of America,
Greeting:

To the Mutual Orange Distributors, a corporation.

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the District Court of the United States, in and for the Southern District of California, Southern Division, and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city of Los Angeles, county of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you, and you are hereby notified that unless you appear and plead, answer or demur, as herein required, the plaintiff will take judgment for any

money or damages demanded in the complaint as arising from contract or will apply to the court for any further relief demanded in the complaint.

Witness the Honorable Benjamin F. Bledsoe, judge of the District Court of the United States, in and for the Southern District of California, this 20th day of January, in the year of our Lord one thousand nine hundred and seventeen, and of our independence the one hundred and forty-first.

(Seal)

WM. M. VAN DYKE,

Clerk.

By R. S. ZIMMERMAN,

Deputy Clerk.

[Received 10-45 a. m. Jan. 22, 1917. U. S. marshal's office, Los Angeles, Cal.]

Return on Service of Writ.

United States of America, Sou. District of Cal.—ss.

I hereby certify and return that I served the annexed summons & complaint on the therein-named Mutual Orange Distributors, a corp., by handing to and leaving a true and correct copy thereof with A. B. Cowgill, secretary of the Mutual Orange Distributors, a corp., personally at Redlands, Cal., in said district, on the 31st day of January, A. D. 1917.

C. T. WALTON,

U. S. Marshal.

By BASSETT,

Deputy.

[Endorsed]: Marshal's Civil Docket No. 3241.]

No. 543 Civil. U. S. District Court, Southern District

of California, Southern Division. The New York Central Railroad *Building*, a corporation, vs. Mutual Orange Distributors, a corporation. Summons. Filed Feb. 2, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. Com. L. R. B. 367. A. B. Cowgill, Sec. Mutual Orange Dist. 1/31/17. E. W. Camp, U. T. Clotfelter, Robert Brennan, plaintiff's attorney.

*In the District Court of the United States, Southern
District of California, Southern Division.*

THE NEW YORK CENTRAL RAILROAD COM-
PANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corpora-
tion,

Defendant.

No. 543 Civil.

Demurrer to Complaint.

Now comes the defendant in the above-entitled action, and demurs to the complaint herein upon the following grounds, to-wit:

I.

That said complaint does not state facts sufficient to constitute a cause of action against the defendant.

II.

That the above-entitled court has no jurisdiction of this cause for the reason that no federal question is involved, nor is there such diverse citizenship as to give the court jurisdiction.

III.

That said complaint is uncertain in this, that it cannot be ascertained whether or not it is claimed that the defendant contracted to pay the freight and other charges sought to be recovered, by an express contract in writing, or whether it is claimed that said promise arose out of a parol agreement or by operation of law.

IV.

Said complaint is also uncertain in this, that it cannot be ascertained therefrom to whom it is claimed that defendant agreed to pay the freight charges on said shipment.

V.

Said complaint is uncertain in this, that it cannot be ascertained therefrom with whom it is claimed defendant contracted both for the shipment of the goods and the payment of freight.

VI.

That the cause of action set forth in said complaint is barred by the provision of subdivision 1 of section 338 of the Code of Civil Procedure of the state of California, and also by the provisions of subdivision 1 of section 339 of said code.

Wherefore, defendant prays that this action be dismissed, and that defendant recover its costs.

WARD CHAPMAN,

L. M. CHAPMAN,

Attorneys for Defendant.

[Endorsed]: Original. No. 543 Civil. Dept. . . In the U. S. District Court, Southern District of California, Southern Division. The New York Central Railroad Company, a corporation, plaintiff, vs. Mutual Orange

Distributors, a corporation, defendant. Demurrer to complaint. Received copy of the within this 20 day of E. W. Camp, U. T. Clotfelter, Robert Brennan, attorney for plaintiff. Filed Feb. 20, 1917. Wm. M. Van Dyke, clerk; by R. S. Zimmerman, deputy clerk. Ward Chapman, L. M. Chapman, 321 B. F. Coulter Building, 213 S. Broadway, Los Angeles, Cal., attorneys for defendant.

Minute Order.

At a stated term, to-wit: the July term, A. D. 1917, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Monday, the sixteenth day of July, in the year of our Lord one thousand nine hundred and seventeen.

Present: The Honorable Oscar A. Trippet, District Judge.

NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS,
Defendant.

No. 543 Civil, S. D. (T)

This cause having heretofore been submitted to the court for its consideration and decision on defendant's demurrer to plaintiff's complaint; the court, having duly considered the same and being fully advised in the premises, now announces its conclusions thereon, and it is accordingly ordered that the said demurrer

of defendant to the plaintiff's complaint be, and the same hereby is sustained, without leave to amend said complaint, and it is further ordered that a judgment of dismissal be entered herein, to which ruling of the court, on application on behalf of plaintiff and by direction of the court, exceptions are hereby noted herein on behalf of said plaintiff.

[Endorsed]: No. 543 Civil (T). United States District Court, Southern District of California, Southern Division. New York Central Railroad Company, plaintiff, vs. Mutual Orange Distributors, defendant. Copy of minute order of July 16, 1917. Filed Jul. 21, 1917. Wm. M. Van Dyke, clerk; Geo. W. Fenimore, deputy.

United States of America, District Court of the United States, Southern District of California, Southern Division.

THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a corporation,

Defendant.

No. 543 Civil.
2 Jud. Reg. 427.

Judgment.

This cause came on regularly for hearing on Monday, the 23rd day of April, 1917, being a day in the January term, A. D. 1917, of the District Court of the United

States of America, in and for the Southern District of California, Southern Division, before the court, on defendant's demurrer to the complaint herein, and after argument by counsel for both parties, the same was ordered submitted to the court for its consideration and decision, and thereafter, to-wit: on Monday, the 16th day of July, 1917, being a day in the July term, A. D. 1917, the court having duly considered the matter and being fully advised in the premises, now announces its conclusions thereon, and orders that the demurrer of defendant to the complaint herein be, and the same hereby is, sustained, without leave to plaintiff to amend the complaint, and that judgment of dismissal be entered herein.

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged by the court that the plaintiff, New York Central Railroad Company, a corporation, take nothing by this, its action, and that the defendant herein, Mutual Orange Distributors, a corporation, go hereof without day; and that said defendant do have and recover of and from said plaintiff, its, said defendants', costs herein taxed at \$14.70.

Judgment rendered, July 21st, 1917.

WM. M. VAN DYKE, Clerk.

By GEO. W. FENIMORE,

Deputy Clerk.

[Endorsed]: No. 543 Civil. United States District Court, Southern District of California, Southern Division. The New York Central Railroad Company, a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Copy of judgment. Filed

Jul. 21, 1917. Wm. M. Van Dyke, clerk; Geo. W. Fenimore, deputy.

*In the District Court of the United States in and for
the Southern District of California, Southern Di-
vision.*

THE NEW YORK CENTRAL RAILROAD COM-
PANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corpora-
tion,

Defendant.

No. 543 Civil.

I, Wm. M. Van Dyke, clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original judgment entered in the above-entitled action, and record in judgment book No. 2, at page 427 thereof; and I further certify that the papers hereto annexed constitute the judgment roll in said action.

Attest my hand and the seal of said District Court,
this 21st day of July, A. D. 1917.

(Seal)

WM. M. VAN DYKE,

Clerk.

By GEO. W. FENIMORE,

Deputy Clerk.

[Endorsed]: No. 543 Civil. In the District Court of the United States for the Southern District of California, Southern Division. The New York R. R. Co., a corp., vs. Mutual Orange Distributors, a corp.

Judgment roll. Filed July 21st, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk. Recorded Jud. Reg. book No. 2, page 427.

*In the District Court of the United States, for the
Southern District of California, Southern Di-
vision.*

NEW YORK CENTRAL RAILROAD COMPANY,
a corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a corpora-
tion,

Defendants.

Civ. Case No. 543.

Conclusions of Court.

The case of Yazoo vs. Zemurray, 238 Fed. 789, is in point on the demurrer in this case, concerning jurisdiction. This being a decision of the Circuit Court of Appeals, and the other cases cited being simply decisions of the district courts, it seems to me it is my duty to follow the Yazoo case. Besides, it seems to me to be based upon reason.

The plaintiff's attorney announced during the argument that he would not amend the complaint. The demurrer, therefore, will be sustained without leave to amend.

OSCAR A. TRIPPET.

[Endorsed]: No. Civ. No. 543. In the District Court of the United States for the Southern District of California. New York Central Railroad Company,

a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Conclusions of court. Filed Jul. 18, 1917. Wm. M. Van Dyke, clerk; by Geo. W. Fenimore, deputy clerk. Oscar A. Trippet, judge.

*In the District Court of the United States, Southern
District of California, Southern Division.*

THE NEW YORK CENTRAL RAILROAD COM-
PANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corpora-
tion,

Defendant.

No. 543 Civil.

Petition for Writ of Error.

The New York Central Railroad Company, a corporation, plaintiff in the above-entitled cause, feeling itself aggrieved by the judgment of the court entered on July 21st, 1917, comes now, by Robert Brennan, its attorney, and files herein an assignment of errors, and petitions said court for an order allowing said plaintiff to procure a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error.

And your petitioner will ever pray, etc.

Dated August 2nd, 1917.

E. W. CAMP,
U. T. CLOTFELTER,
ROBERT BRENNAN,
Attorneys for Plaintiff.

[Endorsed]: Original. No. 543 Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. The New York Central R. R. Co., a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Petition for writ of error. Received copy of the within petition for writ of error this 3rd day of August, 1917. L. M. Chapman and Ward Chapman, attorney for Filed Aug. 3, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. E. W. Camp, Paul Burks, U. T. Clotfelter, M. W. Reed, Robert Brennan, Kerckhoff Building, Los Angeles, California, telephone: Main 2980, attorneys for plaintiff.

*In the District Court of the United States, Southern
District of California, Southern Division.*

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corporation,
tion,

Defendant.

No. 543 Civil.

Assignment of Errors.

Comes now The New York Central Railroad Company, a corporation, plaintiff in the above-entitled cause, and files the following assignment of errors, upon which it will rely in its prosecution of a writ of error in the above-entitled cause, petition for which said writ of error to review the judgment of the Honorable District Court of the United States for the Southern District of California, Southern Division (hereinafter for the sake of brevity styled the trial court), made and entered in said cause on the 21st day of July, 1917, is filed at the same time as this assignment.

ASSIGNMENT I.

That the trial court erred in sustaining generally defendant's demurrer to plaintiff's complaint, and in ordering the dismissal of plaintiff's action.

ASSIGNMENT II.

That the trial court erred in sustaining the defendant's demurrer to plaintiff's complaint on the ground that said complaint does not state facts sufficient to constitute a cause of action against the defendant because the complaint contains appropriate allegations of the acts of the defendant in delivering to The Atchison, Topeka and Santa Fe Railway Company a corporation, for transportation, in interstate commerce, over the lines of that company's railway and its connecting lines, including this plaintiff's line of railway, the three hundred and forty-eight (348) boxes of oranges, and of the failure and refusal of defendant to pay the freight, refrigeration, car service charges

and other lawfully published tariff charges therefor (notwithstanding said oranges, at the special instance and request of the defendant, and in accordance with the agreement in writing evidence by a bill of lading, a copy whereof is attached to the complaint and made a part thereof, and pursuant to its several diversion orders, were transported from Cucamonga, California, to New York City), which the plaintiff was (and is) legally bound to collect under the constitution and laws of the United States, and in accordance with that certain act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce," and acts amendatory thereof and supplemental thereto, by reason whereof plaintiff's complaint states facts sufficient to constitute a cause of action against the defendant, and the first ground of said demurrer should have been overruled.

ASSIGNMENT III.

That the trial court erred in holding it had no jurisdiction of plaintiff's action on the ground that no federal question was involved, or that no diversity of citizenship existed as to confer jurisdiction, because it affirmatively appears by the allegations of the complaint that plaintiff's suit is brought to recover freight charges on an interstate shipment, and is a suit to enforce a right of action created by a federal law, and is a suit which clearly arises under the Interstate Commerce Act (Act of February 4, 1887, c. 104, 24 Stat. 379), Sec. 24, Subd. 8, 36 Stat. 1092 (Comp. St. 1916, Sec. 991, Subd. 8), giving the United States District Court original jurisdiction of suits and proceedings arising under any law regulating commerce, and there-

fore, the trial court had jurisdiction over the parties to and the subject-matter of the action irrespective of the amount in controversy or the citizenship of the parties, and should have so held.

ASSIGNMENT IV.

That the trial court erred in holding that plaintiff's complaint is uncertain, or that it cannot be ascertained therefrom whether or not it is claimed that the defendant contracted to pay the freight or other charges sought to be recovered by an express contract in writing, or whether it is claimed that such promise arose out of a parol agreement or by operation of law, and in sustaining defendant's demurrer on that ground, because the duty of the carrier to charge and collect the regularly established and published rate, and the corresponding obligation of the shipper to pay the same, regardless of any understanding, agreement, or other act of the parties, arises out of the provisions of the Interstate Commerce Act (Act of February 4, 1887, c. 104, 24 Stat. 379) and acts amendatory thereof and supplemental thereto, upon which plaintiff's said complaint is predicated.

ASSIGNMENT V.

That the trial court erred in holding that plaintiff's complaint is uncertain in that it cannot be ascertained therefrom to whom defendant agreed to pay freight charges on the shipment in said complaint described, and in sustaining said demurrer on that ground, for the reason and because the bill of lading attached to and forming a part of the complaint (covering an interstate shipment) fixes the extent of the obligations of the defendant and all participating carriers in so

far as the terms of said bill of lading are applicable, and because, under the Interstate Commerce Act, it became the duty of the plaintiff as the delivering carrier to institute this action for the purpose of recovering all lawful freight and other charges due and owing from the defendant on account of said shipment of oranges.

ASSIGNMENT VI.

That the trial court erred in holding that the plaintiff's complaint is uncertain in that it cannot be ascertained therefrom with whom it is claimed defendant contracted both for the shipment of the goods and the payment of freight, and in sustaining defendant's demurrer to the complaint on that ground, because, under the Interstate Commerce Act (Act of February 4, 1887, c. 104, 24 Stat. 379), a shipper who induces a railroad company to transport a shipment of freight in interstate commerce is liable for the lawful freight and other proper charges thereon, and any participating carrier may bring an action to recover such lawful freight charges.

ASSIGNMENT VII.

That the trial court erred in holding that the cause of action set forth in plaintiff's complaint is barred by the provisions of Subd. 1 of Sec. 338 of the Code of Civil Procedure of the State of California, and also by the provisions of Subd. 1 of Sec. 339 of said code, and in sustaining said demurrer on that ground, for the reason that plaintiff's said cause of action is one to recover the freight charges on an interstate shipment arising under the constitution and laws of the United States, in accordance with the terms and pro-

visions of an act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce," and acts amendatory thereof and supplemental thereto, and pursuant to a written contract evidence by a bill of lading, a copy whereof is attached to said complaint, marked Exhibit "A," expressly referred to and made a part thereof, bearing date January 23, 1913, executed with the state of California; that if the time for the commencement of such action is controlled by the statute of limitations of the state of California, then by the provisions of Subd. 1 of Sec. 337 of the Code of Civil Procedure of that state, an action upon any such contract, obligation or liability may be commenced within four years after such cause of action accrues, and further, because this action was commenced within four years from the 23rd day of January, 1913, to-wit: January 20th, 1917.

ASSIGNMENT VIII.

That the trial court erred in giving and entering judgment of dismissal of plaintiff's action for each and all of the reasons stated in the foregoing assignment of errors, which, by reference, are made a part hereof to the same extent as if incorporated at length herein.

And, upon the foregoing assignment of errors and upon the record in said cause, the plaintiff prays that said judgment may be reversed.

E. W. CAMP,

U. T. CLOTFELTER,

ROBERT BRENNAN,

Attorneys for Plaintiff.

[Endorsed]: Original. No. 543 Civil. In the Dis-

trict Court of the United States in and for the Southern District of California, Southern Division. The New York Central R. R. Co., a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Assignment of errors. Received copy of the within assignment of errors this 3rd day of August, 1917. L. M. Chapman and Ward Chapman, attorney for deft. Filed Aug. 3, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. E. W. Camp, Paul Burks, U. T. Clotfelter, M. W. Reed, Robert Brennan, Kerckhoff Building, Los Angeles, California, telephone: Main 2980, attorneys for plaintiff.

*In the District Court of the United States, Southern
District of California, Southern Division.*

THE NEW YORK CENTRAL RAILROAD COM-
PANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corpora-
tion,

Defendant.

No. 543 Civil.

Order Allowing Writ of Error.

Upon motion of E. W. Camp, U. T. Clotfelter, and Robert Brennan, attorneys for plaintiff, and upon filing a petition for writ of error and an assignment of errors,—

It is ordered that a writ of error be and the same hereby is allowed to have reviewed in the United

States Circuit Court of Appeals for the Ninth Circuit,
the judgment heretofore given and entered herein.

Dated August 3rd, 1917.

OSCAR A. TRIPPET,

District Judge.

The defendant consents to the foregoing order without requiring an undertaking or security from the plaintiff.

L. M. CHAPMAN,

WARD CHAPMAN,

Attorneys for Defendant.

[Endorsed]: Original. No. 543 Civil. In the District Court of the United States in and for the Southern District of California, Southern Division. The New York Central R. R. Co., a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Order allowing writ of error. Received copy of the within order allowing writ of error this 3rd day of August, 1917. L. M. Chapman and Ward Chapman, attorneys for defendant. Filed Aug. 3, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. E. W. Camp, Paul Burks, U. T. Clotfelter, M. W. Reed, Robert Brennan, Kerckhoff Building, Los Angeles, California, telephone: Main 2980, attorneys for plaintiff.

38 *The New York Central Railroad Co. vs.*

*In the District Court of the United States, Southern
District of California, Southern Division.*

THE NEW YORK CENTRAL RAILROAD COM-
PANY, a Corporation,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corpora-
tion,

Defendant.

No. 543 Civil.

Praeipice for Transcript of Record.

To the Clerk of the Above-Named Court:

Please issue a certified copy of the record in the
above-entitled cause, consisting of the papers follow-
ing:

1. Complaint.
2. Demurrer.
3. Judgment Roll.
4. Petition for Writ of Error.
5. Assignment of Errors.
6. Order Allowing Writ of Error.
7. Writ of Error.
8. Citation in Error.

Said record to be certified under the hand of the
clerk and the seal of the above court.

Dated August, 1917.

ROBERT BRENNAN,

Attorney for Plaintiff.

[Endorsed]: Original. No. 543 Civil. In the Dis-
trict Court of the United States in and for the South-
ern District of California, Southern Division. The

New York Central R. R. Co., a corporation, plaintiff, vs. Mutual Orange Distributors, a corporation, defendant. Praeipie for transcript of record. Filed Aug. 3, 1917. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk. E. W. Camp, Paul Burks, U. T. Clotfelter, M. W. Reed, Robert Brennan, Kerckhoff Building, Los Angeles, California, telephone: Main 2980, attorneys for plaintiff.

40 *The New York Central Railroad Co. vs.*

*In the District Court of the United States, Southern
District of California, Southern Division.*

THE NEW YORK CENTRAL R. R. CO., a Cor-
poration,

Plaintiff,

vs.

MUTUAL ORANGE DISTRIBUTORS, a Corpora-
tion,

Defendant.

No. 543 Civil.

I, Wm. M. Van Dyke, clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing thirty-nine (39) printed pages, numbered from 1 to 39, inclusive, to be a full, true and correct transcript of the record of the District Court of the United States of America, in and for the Southern District of California, Southern Division, in the above and therein entitled suit, as the same was prepared and caused to be printed by the appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of, in the year of our Lord one thousand nine hundred and seventeen, and of our independence the one hundred and forty-second.

(Seal)

WM. M. VAN DYKE,

Clerk of the District Court of the United States of
America, in and for the Southern District of
California.

By, Deputy Clerk.

No. 3055.

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

The New York Central Railroad
Company, a Corporation,

Plaintiff in Error,

vs.

Mutual Orange Distributors, a
Corporation,

Defendant in Error.

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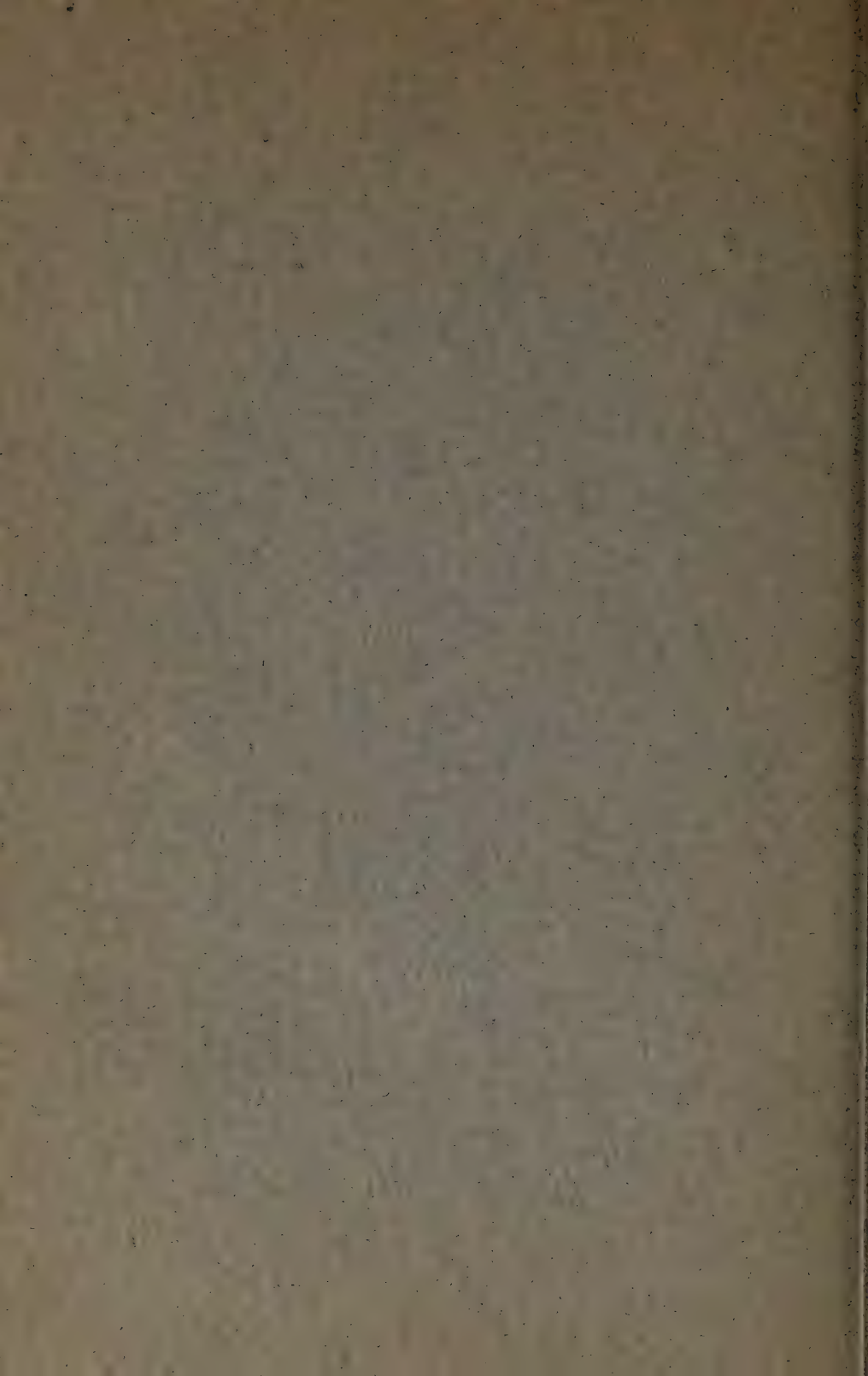
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F. D. McNEIL

BRIEF FOR PLAINTIFF IN ERROR

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BRIEF FOR PLAINTIFF IN ERROR

I.

STATEMENT OF THE CASE.

The plaintiff in error, a common carrier by railroad, transporting interstate commerce, brought this action to recover from the defendant in error the aggregate sum of \$401.27, due as freight, refrigeration, car service, and other lawful tariff charges covering the transportation of 348 boxes, containing oranges, from

Cucamonga, California, to New York City. All charges applied to the shipment were strictly in accordance with the published tariffs and classifications in force and effect at the time and on file with the Interstate Commerce Commission. The oranges were delivered for transportation by the defendant in error to the agent of The Atchison, Topeka and Santa Fe Railway Company, a common carrier by railroad, at Cucamonga, California, on the *23rd day of January, 1913*, consigned to James A. Coogan at Kansas City, state of Missouri, and a standard form of straight bill of lading approved by the Interstate Commerce Commission covering such interstate shipment was issued by that carrier [11-19] and signed by the defendant in error as shipper [12].

Subsequently, (but before the oranges reached Kansas City) the defendant in error by successive diversion orders reconsigned them to itself to points in the states of Kansas, Iowa, Michigan and New York. The plaintiff in error in due course of business received the shipment on its line of railroad at the city of Buffalo, and pursuant to the orders of the defendant in error transported it to New York City.

The complaint averred that under the constitution and laws of the United States, the plaintiff in error was bound to collect the charges and that the amount was due and owing under and in accordance with the terms and provisions of that certain act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce," and acts amendatory thereof and supplemental thereto [10].

A demurrer was interposed to the complaint on the

grounds of insufficiency, uncertainty, want of jurisdiction of the court in that no federal question was involved, no diversity of citizenship existed, and also that the cause of action was barred by virtue of the provisions of subdivision I of section 338 and subdivision I of section 339, of the Code of Civil Procedure of the state of California [22, 23].

But two grounds were urged upon the attention of the trial court, to-wit:

- (a) That the amount involved in the action was insufficient to confer jurisdiction upon the court; and
- (b) The statute of limitations.

The demurrer was sustained generally, but the conclusions of the court as filed indicate that the ruling was based solely upon the jurisdictional question [28].

“CONCLUSIONS OF THE COURT.

The case of Yazoo vs. Zemurray, 238 Fed. 789, is in point on the demurrer in this case, concerning jurisdiction. This being a decision of the Circuit Court of Appeals, and the other cases cited being simply decisions of the District Courts, it seems to me it is my duty to follow the Yazoo case. Besides, it seems to me to be based upon reason.

The plaintiff's attorney announced during the argument that he would not amend the complaint. The demurrer, therefore, will be sustained without leave to amend.

OSCAR A. TRIPPET.” [28.]

The court ordered that a judgment of dismissal be entered against the plaintiff in error. Exceptions

were taken to the court's ruling and order, and entered of record [25]. A writ of error was allowed [36, 37] and the case is here for review upon the following

SPECIFICATIONS OF ERROR.

I.

That the trial court erred in sustaining (generally) the demurrer to the complaint, and in ordering the dismissal of the action.

2.

That the trial court erred in sustaining the demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against the defendant in error, because the complaint contained appropriate allegations of the acts of defendant in error in delivering to The Atchison, Topeka and Santa Fe Railway Company, a corporation, for transportation, in interstate commerce, over the lines of that company's railway and its connecting lines, including plaintiff in error's lines of railway, the three hundred and forty-eight (348) boxes of oranges, and of the failure and refusal of defendant in error to pay the freight, refrigeration, car service, and other lawfully published tariff charges therefor (notwithstanding said oranges, at the special instance and request of the defendant in error, and in accordance with the agreement in writing evidenced by a bill of lading, signed by it [12], a copy whereof is attached to the complaint and made a part thereof [11-19], and pursuant to its several diversion orders, were transported from Cucamonga, California, to New York City), which the plaintiff in

error was (and is) legally bound to collect under the constitution and laws of the United States, in accordance with that certain act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce," and acts amendatory thereof and supplemental thereto, by reason whereof the complaint stated facts sufficient to constitute a cause of action against the defendant in error, and the first ground of the demurrer should have been overruled.

3.

That the trial court erred in holding it had no jurisdiction of the action on the ground that either no federal question was involved, or that no diversity of citizenship existed, so as to confer jurisdiction, because it affirmatively appeared by the allegations of the complaint that the controversy was wholly between citizens of different states [6] and the suit was brought to recover freight charges on an interstate shipment, was a suit to enforce a right of action created by a federal law, was a suit which clearly arose under the Interstate Commerce Act (Act of February 4, 1887, c. 104, 24 Stat. 379), Sec. 24, Subd. 8, 36 Stat. 1092 (Comp. St. 1916, Sec. 991, Subd. 8), giving the United States District Court original jurisdiction of suits and proceedings arising under any laws regulating commerce, and, therefore, the trial court did have jurisdiction over the parties to and the subject-matter of the action, and this was so irrespective of the amount in controversy or of the citizenship of the parties, and it should have so held.

4.

That the trial court erred in holding the complaint uncertain in that it could not be ascertained therefrom whether or not it was claimed that the defendant in error contracted to pay the freight or other charges sought to be recovered, by an express contract in writing, or whether it was claimed that such promise arose out of a parol agreement, or by operation of law, and in sustaining the demurrer on that ground, because the duty of the carrier to charge and collect the regularly established and published rate, and the corresponding obligation of the shipper to pay the same, regardless of any understanding, agreement, or other act of the parties, arises out of the provisions of the Interstate Commerce Act (Act of February 4, 1887, c. 104, 24 Stat. 379) and acts amendatory thereof and supplemental thereto, of which the complaint is predicated.

5.

That the trial court erred in holding the complaint uncertain in that it could not be ascertained therefrom to whom defendant in error agreed to pay freight charges on the shipment in the complaint described, and in sustaining the demurrer on that ground, for the reason that the bill of lading attached to and forming a part of the complaint (covering an interstate shipment) fixed the extent of the obligations of the defendant in error and all participating carriers insofar as the terms of said bill of lading were applicable [11-19], and because, under the Interstate Commerce Act, it became the duty of the plaintiff in error, as

the delivering carrier, to institute this action for the purpose of recovering all lawful freight and other charges due and owing from the defendant in error on account of said shipment of oranges.

6.

That the trial court erred in holding that the complaint was uncertain in that it could not be ascertained therefrom with whom defendant in error contracted both for the shipment of the goods and the payment of freight, and in sustaining defendant's demurrer to the complaint on that ground, because, under the Interstate Commerce Act (Act of February 4, 1887, c. 104, 24 Stat. 379), and acts amendatory thereof and supplemental thereto, a shipper who induces a railroad company to transport a shipment of freight in interstate commerce is liable for the lawful freight and other proper charges thereon, and any participating carrier may bring an action to recover such lawful freight charges.

7.

That the trial court erred in holding that the cause of action set forth in the complaint was barred by the provisions of Subd. 1 of Sec. 338 of the Code of Civil Procedure of the state of California, and also by the provisions of Subd. 1 of Sec. 339 of said code, and in sustaining said demurrer on that ground, for the reason that said cause of action was one to recover the freight charges on an interstate shipment arising under the constitution and laws of the United States, in accordance with the terms and provisions of an act of Con-

gress approved February 4, 1887, entitled "An Act to Regulate Commerce," and acts amendatory thereof and supplemental thereto, and pursuant to a written contract evidenced by a bill of lading, a copy whereof is attached to said complaint, marked "Exhibit A," expressly referred to and made a part thereof, bearing date January 23, 1913, executed within the state of California [11-19]; that if the time for the commencement of such an action is controlled by the statute of limitations of the state of California, then by the provisions of Subd. 1 of Sec. 337 of the Code of Civil Procedure of that state, an action upon any such contract, obligation or liability may be commenced within four years after such cause of action accrues, and further, because this action was commenced within four years from the 23rd day of January, 1913, to-wit, January 20th, 1917 [19].

8.

That the trial court erred in giving and entering judgment of dismissal of plaintiff's action for each and all of the reasons stated in the foregoing specifications of error, which, by reference, are made a part hereof to the same extent as if incorporated at length herein.

II.

ARGUMENT.

This suit was instituted to recover the carrier's charges on an interstate shipment due and owing under and in accordance with the terms and provisions of the acts of Congress regulating interstate commerce. The

suit was rightly commenced in the Federal Court, because paragraph eighth of section 24 of the Judicial Code expressly provides that the District Court shall have original jurisdiction:

“Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court.”

The Commerce Court was abolished by the act of October 22nd, 1913 (38 Stat. at Large 219) and the jurisdiction of that court transferred to and vested in the several District Courts of the United States.

It is no longer disputable since the amendment to the Interstate Commerce Act of February 4, 1887, by the act of June 29, 1906 (34 St. L. 584), and since the ruling of the Supreme Court of the United States in *Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 320, and *St. Louis Etc. R. Co. v. Starbird*, 243 U. S. 592, 61 L. Ed. 917, that Congress, pursuant to the powers conferred upon it by the federal constitution, has assumed and taken full jurisdiction of the subject of interstate commerce, and that this legislation supersedes all the regulations and policies of the several states upon the same subject.

By the provisions of that amendment, commonly known as the Carmack Amendment, a carrier is required to issue a bill of lading (as was done in the instant case) and it limits the power of such carrier to exempt itself by rule, regulation or contract. Prior to its adoption, neither uniformity of obligation nor of liability was possible, because some states allowed

the carrier to exempt itself from all or a part of common law liability, to adopt rules and regulations, and to make certain contracts,—while other did not. As was very aptly said by the court in *So. Pacific Co. v. Crenshaw Bros.*, 5 Ga. App. 675, quoted in *Adams Express Co. v. Croninger*, *supra*:

“The Federal Courts sitting in the various states were following the local rule, a carrier being held liable in one court when, under the same state of facts, he would be exempt from liability in another. Hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own state, or a carrier whose lines were extensive, to know, without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier’s actual responsibility as to goods delivered to it for transportation from one state to another.”

But in the new order of things, much of the old law and many of the old decisions have been superseded. Federal laws cannot be successfully administered unless there be uniformity of actions and decisions. The enactment of paragraph eighth of section 24 of the Judicial Code doubtless was for the purpose of securing this highly desirable result.

Is This a Suit Arising Under Federal Law?

Many tests have been applied to determine when a suit arises under a federal law. But, as we deduce the rule, it does not depend upon whether in the actual trial of the case a controversy will arise as to the

effect or construction of the Federal constitution or law.

It is sufficient if the complaint asserts a right created by Federal law.

M'Goon v. No. Pac. Ry. Co., 204 Fed. 998.

In that case Judge Amidon formulated a test which, as he says, goes far to harmonize the cases (many of which he cites) upon the subject. Particularly does he differentiate those cases where the federal question was only collaterally involved.

Prior to the adoption of the act of January 28th, 1915 (38 Stat. at L. 804), the national courts had jurisdiction of suits against railroad companies incorporated under an act of Congress.

Union Pac. Ry. Co. v. Myers, 115 U. S. 1,
29 L. Ed. 319;

Texas etc. R. Co. v. Cox, 145 U. S. 593,
36 L. Ed. 829;

Texas etc. R. Co. v. Cody, 166 U. S. 606, 41
L. Ed. 1132;

Texas etc. R. Co. v. Bigger, 239 U. S. 330,
60 L. Ed. 310.

The Federal Courts had jurisdiction of all actions under the Federal Employers' Liability Act until that jurisdiction was restricted by the act of April 5th, 1910.

Hall v. Chicago etc. R. Co., 149 Fed. 564;

Watson v. St. Louis etc. R. Co., 169 Fed. 942;

Cound v. Atchison etc. R. Co., 173 Fed. 527;

Clark v. S. P. Co., 175 Fed. 122;

Van Brimmer v. Tex. etc. R. Co., 190 Fed. 394.

A federal question arises *ipso facto* in a suit against a receiver of a national bank appointed by the comptroller of the currency.

McDonald v. Nebraska, 101 Fed. (8 C. C. A.)
171.

A suit to restrain the erection of a bridge over a public navigable stream in which it is averred that complainant claims the right to erect such bridge under a certain act of Congress, raises a federal question.

Hughes v. No. Pac. R. Co., 18 Fed. 106.

A suit to enforce the alleged liability in equity of a Kansas corporation upon the bonds of a railway company, created by an act of Congress, involves a question inherently federal in its nature, so that under the Judicial Code, Sec. 51, it may not, without consent of the Kansas corporation, be brought in any other federal district than that of its residence.

Male v. Atchison etc. Ry. Co., 240 U. S. (Feb. 21, 1916) 97, 60 L. Ed. 545.

These, as well as many other cases which might be cited, serve to establish and confirm our contention that this suit involves a federal question because the complaint declares upon and alleges a right and obligation created and imposed by an act of Congress.

The rates and charges filed and published pursuant to the provisions of Sec. 6, 34 Stat. at L. 587, measure the compensation which the carrier is entitled to receive and which the shipper is required to pay as the consideration for the transportation service.

The Interstate Commerce Commission is charged with the enforcement of the act to regulate commerce. By Sec. 4, 34 Stat. at L., p. 589, amending Sec. 15 of the Commerce Act, it is provided:

“Sec. 15. That the commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, for the transportation of persons or property as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; * * *

The act of Congress further requires that the receiving carrier must issue a receipt or bill of lading for property to be transported in interstate commerce, and it is also made liable for loss or damage accruing on its line or on the line or lines of any other carrier to which the property may be delivered or over whose line or lines of railway it may pass. (34 Stat. at L., page 595.)

Obviously, therefore, every suit to recover freight is based upon the act of Congress. We do not look to the contents of the receipt or bill of lading to determine whether the claim for freight sued on is enforceable at law. We look to the acts of Congress and to the rules and regulations promulgated by the Interstate Commerce Commission thereunder, as well as to the rates, charges and classifications filed and published, to determine that question. We likewise consult the act of Congress to test the obligation of the shipper (where the action is brought by the intermediate or delivering carrier) to pay either to the intermediate or delivering carrier the lawful charges accruing on the shipment. We must look also to the act of Congress to test the right of the receiving carrier to secure reimbursement from the carrier on whose line or lines of railway loss or damage may have occurred. These considerations establish that a suit to recover freight involves a question inherently federal in character. The right of the plaintiff in error herein, as delivering carrier, to maintain this suit for freight charges against the defendant in error, as the shipper of the oranges, is claimed under the federal statute.

**The District Court Had Jurisdiction of This Action
in Virtue of the Provisions of Paragraph Eighth
of Section 24 of the Judicial Code.**

This paragraph has been construed in a number of cases to which we now direct attention.

Atchison etc. Ry. Co. v. Kinkade, 203 Fed. 165, was a suit between a corporation of Kansas and a

citizen of the same state, and was brought by the railway company to recover the sum of \$143.71 as an undercharge, the difference between the freight paid on an interstate shipment and the amount due under the legally established and published rate schedules. Notwithstanding that no diversity of citizenship existed and that the amount involved was but \$143.71, Judge Pollock held that pursuant to the provisions of section 24 of the Judicial Code, he had jurisdiction over the parties to and the subject matter of the controversy.

Reading at page 166 from the opinion, we find this pertinent language:

“Exclusive jurisdiction of the controversy here presented has not been by law conferred upon the Commerce Court, nor is such contention made by defendant. The only question presented by the motion is: Does this action arise under the provision of any law of the United States regulating commerce between the states? In the absence of what is known as the Interstate Commerce Act (Act Fed. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901], p. 3154), the parties would have been free to make any contract they might desire covering the shipment of the emigrant goods of defendant, and such contract when made would have been binding and enforceable. No amount in excess of that stipulated in the contract would have been chargeable or collectible. However, the price to be paid for the performance of such service as is involved in this case is no longer a matter of private contract between the parties, but both the shipper and the carrier are alike bound by the established and published tariff rate made under the Commerce Act. No other amount may

be lawfully either charged, received, or paid. If a greater amount is charged and received, the shipper may recover the excess. If a less amount for any reason is paid by the shipper or received by the carrier, the difference between such amount and the legally established tariff rate may by the carrier be recovered from the shipper. In other words, the rate of carriage by law established, and not the acts or contract of the parties, must control. *Texas & Pacific Railway Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Texas & Pacific Railway Co. v. Cisco Oil Co.*, 204 U. S. 449, 27 Sup. Ct. 358, 51 L. Ed. 562; *Kansas City So. Ry. v. Albers Comm. Co.*, 223 U. S. 573, 32 Sup. Ct. 316, 56 L. Ed. 556; *Robinson v. Balt. & O. R. R. Co.*, 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288; *Carson Lumber Co. v. St. Louis & S. F. R. Co.* (D. C.) 198 Fed. 315.

“As the duty of the plaintiff to charge and collect the regularly established and published rate in this action from defendant, and the corresponding obligation of the defendant to pay the same, regardless of any understanding, agreement, or other act of the parties, arises out of the provisions of the Interstate Commerce Act and not from any contract between the parties, this court has jurisdiction, and the motion to dismiss must be overruled and denied.”

We submit that there can be no distinction of principle between the carrier's duty to collect an undercharge and its duty to collect the entire charge.

In *M'Goon v. Northern Pacific Ry. Co.*, 204 Fed. 998, hereinbefore referred to, it was held that a suit by a shipper against a railway company to recover for damage or injury to property while being transported in interstate commerce is one arising under the Interstate Commerce Act of Feb. 4, 1887, as amended, of which a federal District Court is given original jurisdiction by Judicial Code, section 24, paragraph eighth, and that such a case may be removed into the federal court, although it involved less than \$3,000.00.

In *Ill. Cent. R. Co. v. Segari & Co.*, 205 Fed. 998, plaintiff brought its action in the District Court of the United States for the Eastern District of Louisiana, to recover the sum of \$12.87 as an undercharge. The defendant challenged the jurisdiction of the court. In disposing of this question, Judge Foster, after quoting the provisions of paragraph eighth of section 24 of the Judicial Code, said:

“By the proviso of paragraph one of the same section (24), it is not necessary that such suits should involve an amount exceeding \$3,000.00. Being based on a law of the United States, diversity of citizenship is also unnecessary. I am of the opinion that a suit by a railroad to recover undercharges on interstate freight is one arising under the interstate commerce laws. Therefore, this court has jurisdiction.”

Smith v. Atchison etc. Ry. Co., 210 Fed. 988, was an action by a shipper against the railway company for damages, attorney's fee and penalty growing out of an interstate shipment. The parties to the action

were each and all citizens of the state of Kansas. Defendant caused the suit to be removed from the state court, in which it was brought, into the Federal District Court of Kansas. Plaintiff moved to remand. The court held that jurisdiction attached in the federal court by the removal taken because the action was one arising under the Interstate Commerce Act, and for that reason jurisdiction was conferred by section 24 of the Judicial Code.

“2. A suit arising under a law of the United States is no less removable to a federal court because the law involved has already been decided, construed and settled by the United States Supreme Court.

“3. In a shipper’s action for nondelivery of an interstate shipment, defendants filed in the state court in which the action was brought a motion for an order removing the case to the United States District Court, and such motion was denied, whereupon the moving defendants filed a certified transcript of the record in the United States District Court. Plaintiff was proceeding in the state court, and had procured an order requiring the defendants to plead before a day fixed, and the defendants thereupon filed a bill in the federal court to enjoin plaintiff from proceeding in the state court, and applied for a temporary restraining order restraining further proceedings in the state court pending the hearing of the questions presented by the bill. *Held*, that the application for the restraining order was appropriate and justified, and should have been granted.”

Headnotes to the case of Alabama G. S. Ry. Co. v. American Cotton Oil Co., 229 Fed. (5th C. C. A.) 11.

The opinion sustains the headnotes in every particular and is also illuminative as to the liability of the initial carrier pursuant to the provisions of the Carmack Amendment, as also when a case arises under a federal law.

The court construed paragraph eighth of section 24 of the Judicial Code as conferring additional jurisdiction upon the district courts of all suits and proceedings arising under any law regulating commerce.

In Wells-Fargo & Co. v. Cuneo, decided Feb. 10, 1917, 241 Fed. 726, it is held that an action for freight charges on an interstate shipment is an action arising under an Interstate Commerce Act giving the Federal District Court original jurisdiction of a suit where the amount in controversy is but \$780.70.

The conclusion of the court is based upon the law charging the Interstate Commerce Commission with the enforcement of the Act to regulate commerce, and that since the rates are fixed by the Interstate Commerce Commission, every action to recover freight is therefore based upon the Act itself.

At page 727 the court said:

"It is urged that in this action there is no question as to an overcharge for freight, and that no question involving the construction of the Interstate Commerce Act has arisen. I, however, agree with the opinion expressed by Judge Amidon in the case of McGoon v. Northern Pacific Ry. Co. (D. C.), 204 Fed. 998, that where a federal law creates a right of action and 'a suit is brought to

enforce that right, such a suit arises under the law creating the right.' Where the complaint is based upon a contract between parties that only remotely depends upon federal law, the action should be brought in the state court.

The opinion of Judge Reed in the case of *Storm Lake Tub & Tank Factory v. Minn. & St. Louis Ry. Co.* (D. C.), 209 Fed. 895, is an interesting discussion, in which the court reaches the opposite view. I think, however, the weight of authority and the best reasoned cases support the jurisdiction of the court to entertain this action. *McGoon v. No. Pac. Ry. Co.* (D. C.), 204 Fed. 998; *A. T. & S. F. Ry. Co. v. Kinkade* (D. C.), 203 Fed. 165; *Ill. Cent. R. R. Co. v. Segari* (D. C.), 205 Fed. 998; *Smith v. A. T. & S. F. Ry. Co.* (D. C.), 210 Fed. 988; *Ala. etc. Ry. Co. v. American Cotton Oil Co.*, 229 Fed. 11, 143 C. C. A. 313. The motion to dismiss is denied."

The opinion of Judge Hand written in the above case is followed by District Judge Mayer in the case of *Wells-Fargo & Co. v. Cuneo*, decided April 9, 1917, 241 Fed. D. C. 727.

The question as to the liability assumed for baggage arose in *New York C. & H. R. R. Co. v. Beham*, 242 U. S. 148, 61 L. Ed. 210. A judgment for \$1771.52 had been affirmed by the Kansas City Court of Appeals. The Supreme Court entertained jurisdiction of the case because the transactions related to interstate commerce, and because of consequent rights and liabilities incumbent upon acts of Congress, agreement between the parties, and common law principles accepted and enforced in the federal courts. In this case

it is also held that in order to determine the liability assumed for baggage, recourse might be had to the tariff schedules applicable on file with the Interstate Commerce Commission, and that the carrier had a federal right not only to a fair opportunity to put these in evidence, but also that when they were before the court they should have been given due consideration.

In *Pennsylvania R. Co. v. Olivit Bros.*, 243 U. S. 574, 61 L. Ed. 908, a number of actions were consolidated, each action expressed in a number of counts, and each count praying for the recovery of the sum of \$500.00 for the value of a consignment of water-melons alleged to have been wholly lost or delivered in bad or damaged condition. A motion was made in the Supreme Court to dismiss on the ground that no federal question appeared in the record, or, alternatively, if one appeared, it was without merit. In support of the contentions, it was said that the questions in the case were:

“(1) Whether, it being stipulated that plaintiff was the holder of the bills of lading, it was the owner of the melons at the time the shipments were made;

“(2) Whether there was any evidence of negligence of defendant which should have been submitted to the jury; and

“(3) Whether plaintiff was entitled to recover the freight paid by it.”

In disposing of the motion to dismiss, the court, speaking through Mr. Justice McKenna, said:

“The first question involves the Carmack Amendment; and, considering it, the Court of

Errors and Appeals decided that 'any lawful holder of a bill of lading issued by the initial carrier pursuant to the Carmack Amendment * * * upon receiving property for interstate transportation, may maintain an action for any loss, damage or injury to such property caused by any connecting carrier to whom the goods are delivered.' Citing *Adams Express Co. v. Croninger*, 226 U. S. 491.

"We are not prepared to say that a contest of this view is frivolous, and the motion to dismiss is denied. Besides, it is contended that the shipments having been in interstate commerce they are subject to and governed by the Interstate Commerce Act."

And in *Western Transit Co. v. Leslie & Co.*, 242 U. S. 448, 61 L. Ed. 423, the question presented was whether a shipper was entitled to the full value of certain copper lost, amounting to \$271.38, or whether the carrier's contention should be upheld that the damages recoverable were limited to \$94.10.

The Supreme Court reviewed the judgment of the Supreme Court of the state of New York and held that the release valuation clause in an interstate bill of lading when based upon a difference of freight rates was valid.

The question must have been under federal law, else in view of the amount in controversy the Supreme Court would not have entertained jurisdiction.

In *St. Louis Ry. Co. v. Starbird*, decided April 30, 1917, 243 U. S. 592, 61 L. Ed. 917, the court said:

“A case is reviewable in this court where any title, right, privilege or immunity is claimed under a statute of the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed by either party under such statute.”

In *Central R. Co. of New Jersey v. Hite et al.*, 166 Fed. 976, it is held that a Circuit Court of the United States has jurisdiction to determine in the first instance the question of the indebtedness of a shipper to a railroad company for demurrage under the rules adopted by the company and filed with the Interstate Commerce Commission.

Lyne v. Delaware etc. R. Co., 170 Fed. 847, is authority for the proposition that a shipper may maintain an action at law in the federal courts under the Interstate Commerce Act of February 4, 1887, to recover damages from an interstate railroad company because of the giving of a preference or advantage to another shipper.

In *Hite et al. v. Central R. of New Jersey*, 171 Fed. (3rd C. C. A.) 370, it is held that a Circuit Court of the United States has jurisdiction to determine in the first instance the indebtedness of a shipper to a railroad company for demurrage under the rules adopted by the company and filed with the Interstate Commerce Commission, where it depends on the construction, and not on the reasonableness or unreasonableness, of such rules, although the latter question is one primarily for the Commission.

In *Darnell, Inc., v. Illinois Cent. R. Co.*, 190 Fed. 656, the rule is stated that jurisdiction of claim for damages against an interstate carrier because of excessive rates charged and collected by it from the claimant is expressly limited by the Interstate Commerce Act of February 4, 1887, to the Interstate Commerce Commission or a District or Circuit Court of the United States, and that the provision of section 16 of the Act, as amended by the Act of June 18, 1910, c. 309, sec. 13, 36 Stat. 554, extending such jurisdiction to the state courts, applies, by its terms, only to claims which have been previously determined by the Commission, and on which it has made awards which have not been complied with.

In *Georgia etc. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948, it is held that the question as to the proper construction of a bill of lading for an interstate shipment issued under the Carmack Amendment is a federal one which will sustain the appellate jurisdiction of the federal Supreme Court over a state court.

Questions raised for decision by conflicting contentions are usually important to the parties litigant. But, in this case, there is the question of *public importance* as well. If parties feel that uniformity of decision can best be secured by instituting cases of this character in the federal district courts, and thereby more effectually accomplish the object and purpose which actuated Congress in taking possession and legislating with respect to interstate commerce, the federal courts, we feel quite sure, will willingly assume jurisdiction of a case without regard to the amount in controversy

where the facts as here present a question of federal law.

As was said by Chief Justice Marshall and delivered in the opinion of the court in the great case of *Cohens v. Virginia*, 6 Wheat 264 (p. 291):

“It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty.”

Yazoo v. Zemurray (5th C. C. A.), 238 Fed. 789, upon the strength of which the trial court made and filed its conclusions of law herein, does not unequivocally decide that an action for freight may not be maintained in the federal District Court by a carrier against a shipper where the amount involved is less than \$3,000.00. All that can be claimed for the decision is that the court on its own motion expressed some doubt with regard to the question. For aught that appears, no allegation was contained in the complaint as a basis for the claim of right or privilege under any federal

law relating to interstate commerce. The case was disposed of both in the trial court and the Circuit Court of Appeals on the theory that the railroad company had in some manner estopped itself from successfully asserting a claim against the shipper, because it might have collected its freight bill had it sued the consignee therefor, and that it would be inequitable to permit the carrier "to change its base and proceed against the consignor, who was only technically liable.' "

We submit that in the language of Judge Hand in *Wells-Fargo & Co. v. Cuneo*, *supra*, "the weight of authority and the best reasoned cases support the jurisdiction of the court to entertain this action."

III.

The Statute of Limitations.

Was this action barred by the provisions of subdivision one of section 338 of the Code of Civil Procedure of the state of California, and also by the provisions of subdivision one of section 339 of said Code?

Subdivision one of section 338 refers to an action upon a liability created by statute other than a penalty or forfeiture, and must be commenced within three years after the action accrues.

Subdivision one of section 339 of said Code requires an action upon a contract, obligation or liability not founded upon an instrument in writing to be commenced within two years.

The reasonable construction of the Interstate Commerce Act is that the railway company is required to

exhaust its legal remedies before unpaid freight charges can be written off to "Loss and Gain." Congress has not enacted any statute of limitations on the subject. But conceding, *arguendo*, that the time within which this action must be commenced was controlled by the laws of the state of California on that subject, it is submitted that this action is not within the purview of the statute cited in the demurrer and relied upon by defendant in error.

In the first place, this is not an action upon a liability created by a statute of the state of California. Therefore, subdivision one of section 338 of the Code of Civil Procedure of that state is wholly eliminated from the inquiry.

Subdivision one of section 339 of the Code of Civil Procedure of that state can have no application whatsoever, because that statute has reference to an action upon a contract, obligation or liability not founded upon an instrument in writing. So that if, for the purpose of considering the statute of limitations, we treat the bill of lading in this case as a contract forming the basis of the action, we are dealing with an action founded upon an instrument in writing.

Subdivision one of section 337 of the Code of Civil Procedure of the state of California provides that "an action upon any contract, obligation or liability founded upon an instrument in writing executed within this state * * *" shall be commenced within four years.

For the purposes of the demurrer it is admitted that the action was brought within four years from the time the oranges were shipped. It is admitted that

at the time the oranges were shipped a written bill of lading was issued by the initial carrier. It is admitted that by the provisions of section 8 of the bill of lading (18) the owner or consignee is required to pay the freight and all other lawful charges accruing on the property involved in the shipment. The section is as follows:

“Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.” (18)

Counsel for the defendant in error urged upon the attention of the trial court, and doubtless will urge upon the attention of this court, that since there is no allegation in the complaint that the defendant in error was the owner of the property, and since the original consignee named in the bill of lading was James A. Coogan, therefore, the defendant was neither the owner nor consignee, and hence, his legal liability, if any there was, for the freight and transportation charges arises by implication of law only.

But, it is shown on the authority of Georgia etc. R. Co. v. Blish Milling Co., *supra*, that this position is untenable. In that case the court held that in an interstate shipment the bill of lading is the contract which controls and governs the entire transportation and fixes the obligations of all participating carriers

to the extent that the terms of the bill of lading are applicable and valid.

It will be observed from reading paragraph III of the complaint (7) that after the oranges had been consigned and received by the initial carrier for transportation, the defendant in error reconsigned them to Wichita, Kansas, and thereafter, and from time to time, different diversion orders were given by the defendant in error and acted upon by the carriers, so that as a matter of fact, after the oranges were received by the initial carrier for transportation, the defendant in error, by its diversion orders, thereby assumed full charge and control of the property and was both shipper and consignee. This because, according to the allegations of the complaint, which for the purposes of the demurrer are deemed to be admitted, delivery at the several intermediate points referred to in the complaint was made to the defendant in error as shipper and as consignee (8, 9). As such consignee, the defendant in error had expressly agreed by the provisions of the bill of lading to pay such transportation charges (18).

The shipment moved under the written bill of lading. The defendant in error delivered the oranges to the initial carrier and assumed full control of the property. As was said in the case of *A. T. & S. F. Ry. Co. v. Stannard & Co.*, 162 Pac. 1176, "*whether the shipper or the consignee is primarily liable between themselves for the freight charges is no concern of the railway company. Since the shipper is the person who deals with the railway company and the one who*

induces the carrier to perform the transportation service, he is liable absolutely."

Seaboard Air Line Ry. v. Luke, 90 S. E. (Ga.) 1041, was an action commenced by the railway company to recover an undercharge growing out of the shipment of a carload of automobiles. A uniform interstate bill of lading was issued covering the shipment. On the back of the bill of lading so issued was the following provision:

"Section 8. The owner or consignee shall pay the freight, and average, if any, and all other lawful charges accruing on said property."

(The court will note that this provision corresponds to section 8 of the bill of lading (18) in the instant case.)

After certain proceedings were had in the justice's court the action was dismissed by the judge of the Superior Court on the ground that the action was barred by the statute of limitations, it having been brought within six years, but more than four years after the right of action accrued.

The court held in that case that this code section was binding upon the carrier and the shipper, and also binding upon the consignee or the "order-notify" consignee, and that the suit was not barred because not brought within four years, and that the lower court erred in failing to render a final judgment for the plaintiff.

The court decides that a bill of lading is a written contract controlling all the parties concerned in the

shipment and governing the entire transaction. The court cites, among other cases,

Georgia etc. Ry. v. Blish Milling Co., 241 U. S. 190;

McElveen v. Southern Ry. Co., 109 Ga. 249, 34 S. E. 281;

Hutchinson on Carriers (3rd Ed.), section 157.

In the case of Texas & P. Ry. Co. v. Williamson & Co., 187 S. W. 354, it is held that a through bill of lading is a contract in writing within the meaning of Texas Revised Statutes 1911, article 5688, subdivision 1, providing that actions for debt or contracts in writing shall be commenced within four years.

In the case of Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998, the court, speaking through Mr. Justice Miller, said:

“A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. * * *

“It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver.”

The above language is quoted with approval in the case of St. Louis etc. R. Co. v. Knight, 122 U. S. 79, 30 L. Ed. 1077, and in which the court further says:

“And the doctrine is applicable to transportation contracts made in that form by railway carriers and other carriers by land as well as by sea.”

To the same effect, see

Friedlander v. Texas etc. R. Co., 130 U. S. 426,
32 L. Ed. 994.

In 4 Am. & Eng. Ency. of Law, 2nd Ed., at page 521, it is said that:

“Although the primary office and purpose of a bill of lading is to express the terms of the contract between the shipper and the carrier, it partakes of the twofold character of a receipt and a contract; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract as to the transportation and delivery of the goods to the consignee or other person therein designated and upon the terms therein specified.”

Among the cases cited to support the text are:

Pollard v. Vinton, 105 U. S. 7;

St. Louis etc. R. Co. v. Knight, *supra*.

“The office of a bill of lading is to embody the contract of carriage as well as to evidence the receipt of the goods; and when the shipper accepts it without objection before the goods have been shipped, and permits the carrier to act upon it by proceeding with the shipment, it is to be presumed that he has accepted it as containing the contract, and that he has assented to its terms except, as we have seen, insofar as it undertakes to limit the general liability of the carrier.”

Central R. & B. Co. v. Hasselkus, 17 S. E.
(Ga.) 838.

“A bill of lading is a written acknowledgment, signed by the master, that he has received the goods therein described from the shippers, to be transported on the terms therein expressed. It is a receipt for the quantity of goods shipped and a promise to transport and deliver them as therein stipulated.”

The Tongoy, 55 Fed. 331.

“A bill of lading is a contract including a receipt.”

O'Brien v. Gilchrist, 34 Me. 554;

Babcock v. May, 4 Ohio (4 Ham.) 334;

Stapleton v. King, 33 Iowa 28;

Davis v. Central Vt. R. Co., 29 At. 313.

A bill of lading when signed by the carrier and delivered to and accepted by the shipper without objection; in the absence of fraud, constitutes the contract of carriage, and binds the shipper, *though not signed by him*; and a stipulation stamped on the face of the bill of lading before its delivery to the shipper by its express terms included therein becomes a part of the contract.

The Henry B. Hyde, 82 Fed. 681.

IV.

The Complaint Is Not Vulnerable to Demurrer on Grounds of Uncertainty.

It is contended that the complaint is uncertain in that it cannot be ascertained therefrom with whom defendant in error contracted, both for the shipment of the goods and the payment of freight, or to whom

defendant in error agreed to pay the freight charges on the shipment. (23)

It is further suggested by the demurrer that it cannot be ascertained whether the claim asserted arose out of an express contract in writing, a parol agreement, or by operation of law.

We submit that all of these contentions are beside the question and rendered wholly immaterial in view of the provisions of the Carmack Amendment and the construction placed thereon by the Supreme Court of the United States in the cases to which we have already drawn attention.

The liability of the defendant in error herein is fixed by the provisions of the Acts of Congress relating to interstate commerce, as certain and as definite as is possible for law to create obligation and liability.

The law on this subject is admirably and concretely stated in the headnotes to the case of *A. T. & S. F. Ry. Co. v. Stannard & Co.*, 162 Pac. 1176, as follows:

“1. A shipper who induces a railway company to transport a shipment of freight in interstate commerce is liable for the lawful freight charges thereon.

“2. Since the adoption of the Interstate Commerce Act and its later amendments, it is unavailing as a defense to an action for the charges on an interstate freight shipment that the shipper had long been a patron of the railway company and had a special understanding and custom in his dealings with the company whereby the carrier was to be the agent of the consignee as to all shipments delivered by defendant, and that he

guaranteed the freight charges only upon condition that he should be promptly notified by the carrier if any consignee refused to accept a shipment and refused to pay the freight charges thereon.

“3. All special arrangements, agreements, customs and understandings between individual shippers and interstate railroads, not open to all similar shippers on equal terms, nor on file with the Interstate Commerce Commission nor sanctioned by that tribunal, are void, and a defense to an action for interstate freight charges based thereon is subject to demurrer or motion for judgment.”

In that case the court, by placing its construction on the Interstate Commerce Act and the rules and orders promulgated by the Interstate Commerce Commission pursuant to its terms, determines that a railway company has no choice but to demand the freight charges from the shipper if they are not paid by the consignee, and the railway company is required to exhaust its legal remedies before the unpaid freight charges can be charged off to “Loss and Gain.”

The court, in commenting on this branch of the case, said:

“The situation of the railroad is not unlike that of a public tax collector. If a tax is not paid, a tax warrant must issue, and the processes of law must be set in motion, one after another, so long as there is the slightest chance to collect it.

“Whether the shipper or the consignee is primarily liable between themselves for the freight charges is no concern of the railroad company. Since the shipper is the person who deals with the

railway company and the one who induces the carrier to perform the transportation service, he is liable absolutely. *Portland Flouring Mills Co. v. British & F. M. Ins. Co.*, 130 Fed. 860, 65 C. C. A. 344; *Baltimore etc. R. Co. v. New Albany Box etc. Co.*, 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28; *Baltimore & Ohio Railroad Co. v. La Due*, 128 App. Div. N. Y. 594, 598, 112 N. Y. Supp. 964; 2 Moore on Carriers, 669."

The court's conclusion must be predicated upon the provisions of the Carmack Amendment, because we have seen that prior to the passage of that Act the railway company and the shipper were left largely to their private contracts. Now all such rules, regulations and agreements must be framed in terms applying to all shippers alike or affecting them in some general and reasonable classification which do not offend against the anti-discrimination features of the Interstate Commerce Act, and approved by the Interstate Commerce Commission.

For these reasons it is respectfully submitted that the trial court committed error calling for reversal in sustaining the demurrer and giving judgment providing for the dismissal of the action.

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No. 3055.

United States
Circuit Court of Appeals, 13
FOR THE NINTH CIRCUIT.

The New York Central Railroad
Company, a Corporation,

Plaintiff in Error,

vs.

Mutual Orange Distributors, a
Corporation,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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United States
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The New York Central Railroad
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Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

According to the complaint in this action, about January 23, 1913, the defendant, pursuant to a written contract (which is the bill of lading attached to the complaint) shipped over the lines of the Santa Fe Railway Company from Cucamonga a carload of oranges with Kansas City as the original point of destination, and with James A. Coogan as consignee. Sometime after shipment, defendant reconsigned said shipment to Wichita, Kansas, where upon arrival of

the goods a tender of delivery was made to defendant, but thereafter defendant reconsigned said shipment, on or about February 5, 1913, to Des Moines, Iowa, and again a tender of delivery was made.

On February 15, 1913, defendant again reconsigned the shipment to Clinton, Iowa, and thereafter from time to time other reconsignments were made at different points along the lines of the Santa Fe and connecting carriers, until finally, upon their arrival at Buffalo, New York, the car was taken by the plaintiff as a connecting carrier, which company in pursuance of reconsignments by defendant, transported the car, first to Albany, New York, and thence to New York City, where, upon inspection, it was discovered that the oranges were unfit for human consumption, and the entire carload was by the health department of the city ordered destroyed. [Record pp. 6-9.]

Under the terms of the contract and in accordance with the tariffs and classifications applicable thereto, and in force and effect and on file with the Interstate Commerce Commission, the freight, refrigeration, car service charges and other lawful expenses of transportation, became due on the shipment amounting to the sum of \$401.27—"which said total sum, under the Constitution and laws of the United States, the plaintiff was and is bound to collect, and which said amount is justly due the plaintiff from the defendant," but defendant has refused to pay the same.

"That under and in pursuance with the terms and provisions of an act of Congress made February 4, 1887, entitled 'An Act to Regulate Commerce,' and

acts amendatory thereof and supplemental thereto, there is now due, owing and unpaid by defendant to plaintiff said sum of \$401.27." [Record pp. 9-10.]

The bill of lading was issued by the Atchison, Topeka & Santa Fe Railway Company, and recites the receipt of the goods from the defendant, "subject to the classifications and tariffs in effect on the date of the issue of this original bill of lading," consigned to James A. Coogan, destined to Kansas City, and "which said company agrees to carry to its usual place of delivery at said destination if on its road, otherwise to deliver to another carrier on the route to said destination."

By the terms of the bill of lading it was agreed that every service to be performed thereunder should be subject to the conditions printed in the bill of lading, among others the following:

"In issuing this bill of lading this company agrees to transport only over its own line and except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its own line." [Record p. 15.]

"*Section 8.* The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required, shall pay the same before delivery." [Record p. 18.]

A demurrer to the complaint was interposed specifying insufficiency of facts to state a cause of action; lack of jurisdiction; certain grounds of uncertainty; and the statute of limitations. [Record p. 22.]

Plaintiff was given an opportunity to amend the complaint, but declined to do so. [Record p. 28.]

And accordingly the demurrer was sustained without leave to amend. [Record p. 24.]

I.

The United States District Court Is Without Jurisdiction of the Case Stated in the Complaint, and the Demurrer Was Properly Sustained on That Ground.

The diversity of citizenship between the parties to the suit did not confer jurisdiction because the amount involved was less than three thousand dollars. (Judicial Code, Sec. 24, Par. 1.)

Unless, therefore, a federal question is involved, the action was properly dismissed for want of jurisdiction. We contend that no federal question is involved.

Subdivision 8 of section 24 of the Judicial Code provides that the District Court shall have original jurisdiction "of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the commerce court."

Does this suit arise under any law regulating commerce? To answer this question we must first determine what is meant by the words "arising under any law." This same phraseology was used in the judiciary act originally adopted, and has been the subject of frequent discussion ever since the federal courts were created. And while there has been a wide diversity of irreconcilable statements on the subject, neverthe-

less we think we are safe in saying that according to the great preponderance of authority something more is required than a mere reference to some federal law which might be remotely involved. On the contrary, it must appear either that the suit depends upon and is referable to some federal statute, treaty or constitutional provision except for which the remedy does not exist, or else there must be a substantial dispute as to the construction of some provision of the federal law. If in fact the determination of the case depends upon the decision of questions of local or general law, it cannot be brought within the jurisdiction of the federal court as one arising under the laws of the United States merely by a reference in the complaint or declaration to some federal statute.

See the exhaustive compilation of decisions on this subject in the annotations of the original act defining the jurisdiction of the Circuit Court.

4 Fed. Stats. Ann., p. 265, and especially pp. 281-288.

And also for a most concise and clear resume of the conflicting definitions of the meanings of the terms as applied to a case wherein it was claimed that a suit growing out of the Interstate Commerce Act gave rise to a federal question, see:

McGoon v. Northern Pacific Etc. Distr. Court,
North Dakota, 204 Fed. 998,

wherein Judge Amidon quotes the following from the case of Defiance Water Company v. Defiance, 191 U. S. 184, 48 L. Ed. 140:

“When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in a legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground.”

48 L. Ed. 1001.

In that case the conclusion was reached that the case did arise under the interstate commerce law, because it was an attempt to hold a carrier responsible for damages to livestock under such circumstances as that it could not have been responsible except for the provisions of that act. In other words, a liability was directly created by the act, and except for the statute plaintiff would not have had a right of recovery at all. While the facts are not very clearly set forth in the decision, nevertheless it is stated that:

“Defendant’s liability arises wholly out of section 20 of the Interstate Commerce Act * * * which section abrogates all state and common-law liabilities on interstate shipments of property. If the statute does not give plaintiff a right of recovery, he has none.”

48 L. Ed. 999.

The section referred to, after elaborate provisions as to detailed reports by carriers as to statistics of earnings, etc., requires that every common carrier receiving property for transportation from one state to another, must issue a bill of lading, "and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such carrier from the liability hereby imposed."

Fed. Stats. Ann. Sup. of 1909, page 273.

Now before this statute was enacted, where the injury to the property occurred on the lines of a connecting carrier, the shipper could only recover from that carrier, but under this provision the initial carrier who issues the bill of lading is liable under all circumstances. Therefore a suit against the initial carrier where the loss occurred on the lines of another carrier is dependent entirely upon the federal statute, and hence may be said to arise under a law regulating commerce.

But in our case the obligation to pay freight is not dependent upon the interstate commerce law, nor in any way referable to it. It exists either by virtue of the written contract to pay the freight, or else is implied by law, and a recovery may be had either against the owner, the consignor or the consignee, on the strength

of this implied or express promise to pay, quite independently of the Interstate Commerce Act.

Chicago Etc. R. Co. v. Floyd (Texas), 161
S. W. 954;

Cincinnati Etc. R. Co. v. Vredenburg Sawmill
Co. (Ala.), 69 So. 228, especially 230;

Cornelius Co. v. Central Etc. R. Co. (Ala.),
69 So. 331,

wherein many cases are cited.

New York Etc. R. Co. v. York & Whitney Co.
(Mass.), 102 N. E. 366.

Moreover, it must be borne in mind that in our case there is no claim that any dispute exists as to the *amount* of the freight. On the contrary, the bill of lading expressly recites that the goods are received "subject to the classification and tariffs in effect on the date of issue of this original bill of lading." Therefore the amount of the freight is fixed by contract in exact accordance with the allegations of the complaint, and hence in no conceivable sense is either the suit dependent upon the interstate commerce law or any other federal statute, nor is the liability created by any such statute, nor will the decision of the case involve the interpretation of any law of the United States; but, on the contrary, the liability is purely a contractual one, either express or implied, and insofar as this defendant is concerned, our contention is that it is an implied one, because there is no express promise in the bill of lading on the part of the consignor to pay the freight, as we shall contend in connection with the defense of the statute of limitations.

Measured by the test of federal jurisdiction set forth by Judge Amidon in the McGoon case, we submit that our case does not arise under any federal law. He states the rule thus:

“The line of distinction which it seems to me will go far to harmonize the cases is this: When the complaint shows a case which arises out of a contract or a common-law right of property, and only indirectly and remotely depends on federal law, such a case not only does not, but cannot, properly turn upon a construction of such law. But when the complaint asserts a right *created* by federal law, it presents a suit which may properly turn upon a construction of that law; and such a suit ‘arises out of’ the law for purposes of federal jurisdiction notwithstanding the defendant may raise only issues of fact by his answer.”

204 Fed. 1005.

The distinction which we have pointed out between our case and the McGoon case will serve also as the basis of distinction between the case at bar and the following other cases cited by plaintiff in error, to-wit:

Smith v. Santa Fe Ry. Co., 210 Fed. 988;
Santa Fe v. Kinkade, Judge Pollock, 203 Fed.
165;

Illinois Central v. Segari, Judge Foster of La.,
205 Fed. 998;

Alabama Great Southern v. American Cotton
Oil Co. (C. C. A. 5th Cir.), 229 Fed. 11;

New York Etc. R. Co. v. Beham, 242 U. S. 148,
61 L. Ed. 210;

Pennsylvania R. Co. v. Olivit Bros., 243 U. S.
574, 61 L. Ed. 908;

Darnell v. Ill. Cent. R. Co., 190 Fed. 656;

Lyne v. Delaware Etc. R. Co., 170 Fed. 847.

Those cases were either cases for freight wherein the shipper and railroad company had contracted for a rate which conflicted with the tariffs established by the Interstate Commerce Commission, and the decision of the case necessarily involved the determination of the question of whether the tariff rates controlled the contract rates or not, or else the cases involved an attempt to collect damages from the initial carrier where the loss occurred on connecting lines, which remedy is created by the statute, and unqualifiedly dependent upon it. Besides, we have the authority of the C. C. A., 5th Circuit, in a case identical with ours, declaring that no jurisdiction exists.

Yazoo Etc. Co. v. Zemurray, 238 Fed. 789,
wherein the court said:

“On the facts stated we doubt the jurisdiction of the court on the ground that the amount involved is less than \$3,000. It appears to be a case of ordinary collection of a freight bill wherein the carrier, through error and neglect, failed to collect the stipulated freight from the consignee and now sues the consignor.

“We find no evidence in this case involving the Elkins law, or any other interstate commerce law.”

Id. 791.

See also,

Taylor v. Anderson, 234 U. S. 74,
wherein the rule is stated as follows:

“It is now contended that these allegations show that the case was one arising under the laws of the United States—namely, the acts restricting the alienation of Indian allotments—and therefore brought it within the court’s jurisdiction. But the contention overlooks the repeated decisions in this court by which it has become firmly settled that whether a case is one arising under the Constitution or a law or treaty of the United States in the sense of the jurisdictional statute (now §24, Judicial Code) must be determined from what necessarily appears in the plaintiff’s statement of his own claim in the bill of declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.” (Citing numerous cases.)

234 U. S. 75.

Also, in the case of

St. Louis Southwestern Ry. Co. v. Gramling
(Ark.), 133 S. W. 1129,

there was involved an attempt made by a railway company to recover unpaid freight growing out of a failure to quote the proper rates. It was contended by defendant’s counsel that the state court had no jurisdiction to entertain the case because the matter involved related to an interstate shipment, and that any right which plaintiff might have was cognizable only before the Interstate Commerce Commission or a United States court.

“It is urged that the freight or compensation for which plaintiff seeks recovery in this case is a subject of interstate commerce and governed by the Interstate Commerce Act of Congress, approved February 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), and the act of Congress amendatory thereof (Act of June 11, 1906, c. 3073, 34 Stat. 232,—U. S. Comp. St. Supp. 1909, p. 1148—), and that on this account a recovery of such freight cannot be enforced in a state court. *But we do not think that the cause of action set out in the complaint grows out of any right created by or springing from said acts of Congress. The cause of action herein set out is simply for the recovery of an indebtedness due for a service performed. The indebtedness grows out of a contract, which is only an incident of an interstate shipment, and is not a liability springing from or created by any act of Congress. It is simply alleged that the defendant owed to plaintiff a certain sum for the transportation of his goods; that in making payment of the freight a mistake was made, so that the defendant did not pay the entire amount of the charges; and that therefore he owes the balance. It is, in effect, a suit to recover a balance claimed to be due upon an account.*”

133 S. W. 1131.

The distinction between the cases cited by appellant wherein federal jurisdiction was upheld in suits against the initial carrier for damages resulting to goods on the lines of connecting carriers, and which we have hereinbefore referred to, is clearly pointed out by

Judge Reed of the Northern District of Iowa in the case of

Storm Lake Tub Factory v. Minneapolis Etc.
R. Co., 209 Fed. 895.

He points out that at the common law and quite independently of any federal legislation, a shipper is liable for damages for injuries to or loss of goods occurring on its own lines except where the loss resulted from the act of God, but at the common law an initial carrier under such a state of facts would not be liable for loss through the fault of a connecting carrier to whom it had in due course safely delivered the goods for further transportation unless such a liability was undertaken by express contract. However, under the Carmack Amendment, the liability is extended in favor of the shipper against the initial carrier for any loss, damages or injury caused by it or by any common carrier to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such carrier from the liability thereby imposed.

This legislation was upheld by the Supreme Court of the United States, as Judge Reed points out in the case of

Atlantic Etc. R. Co. v. Riverside Mills, 219
U. S. 186, 31 Supr. Ct. Rep. 164, and re-
ported also 31 L. R. A. (N. S.), page 7.

where, in an exhaustive note, the liability of carriers from loss beyond their own lines is considered.

In the language of Judge Reed: This act creates a right of action against such carriers that did not previously exist insofar as suits or actions for damages against the initial carrier for loss which has occurred upon the lines of connecting carriers is concerned, but that insofar as suits against the initial carrier are concerned for injury to or loss of property occurring on its own line, they do not arise under the act to regulate commerce, but are actions to recover from such carrier upon its common law liability.

And he further says:

"The Carmack Amendment does not create its liability for such a loss, for such liability arises under the common law which holds a common carrier of property liable for its loss or injury while in its custody as such carrier from all causes not due to an act of God or the public enemy."

Id. 903.

The same reason, we submit, and a like distinction may be applied to the freight cases relied upon in the brief of plaintiff in error with possibly one exception.

In the Kinkade case, 203 Federal 165, cited on page 16 of appellant's brief, the amount of freight paid and presumably the amount contracted to be paid, although the statement of facts is not very clear on the point, was \$267.37, whereas the regularly established tariff on file with the Interstate Commerce Commission amounted to \$411.08, and the suit was to recover the difference. Obviously, except for the Interstate Commerce Act, there would have been no right of action

for this difference; on the contrary. the contract rate would have controlled, so that the suit was necessarily based upon the federal statute. But it will be remembered that in our case the contract fixed the freight rates in accordance with the classifications and tariffs in effect on the date of issuance of the bill of lading, so that the right of action on the contract was complete and unqualified and quite independent of the statute.

The same is true of the Segari case, 205 Federal 998, cited on page 19 of the brief. The tariffs on file with the Interstate Commerce Commission called for 47 cents per cwt., whereas the railroad company had contracted to transport the goods for 42 cents per cwt. The suit was to recover the difference. Manifestly, except for the Interstate Commerce Commission, the suit could not be maintained, and therefore logically be said to be based upon a federal law.

The case of Wells Fargo Against Cuneo, 241 Federal 726, cited on page 21 of the brief, does not, in the statement of facts, disclose whether there was a discrepancy between the contract rate and the published tariff or not, but it is plain from the opinion that in some measure there must have been involved a dispute or controversy as to the effect or construction of a federal law—for it is said:

“Where the complaint is based upon a contract between parties that only remotely depends upon federal law, the action should be brought in the state court.”

Id. 727.

This remark describes the precise situation in our case. To recover on the contract sued upon, it is only necessary to refer to the public tariffs to ascertain the amount expressly stipulated to be paid, because those tariffs are referred to in the contract. Certainly the mere reference to the Interstate Commerce records for that purpose does not make the federal law the basis of the suit.

We submit also that there is much force in Judge Reed's suggestion in the Storm Lake case, *supra*, that nothing but the most clear and unequivocal language indicating an intent to vest the federal courts with jurisdiction over the myriad of suits for freight usually involving only trifling sums would warrant extension of the jurisdiction to such cases, and that "it seems incredible that Congress should have intended by the Judicial Code to confer jurisdiction upon the District Courts of the United States of causes of action such as that alleged in plaintiff's petition, and it is clear that it has not by apt words done so." (209 Fed. 903.)

Most cases of that character are properly cognizable in the justices' court, and there they should be disposed of.

II.

If the Court Has Jurisdiction, the Action Is Barred by the Statute of Limitations.

The action was brought within four years from the time the goods were shipped, but more than three years thereafter. We have pleaded in defense both subdi-

vision 1 of section 338, which bars an action upon a liability created by statute within three years, and subdivision 1 of section 339 of the California Code of Civil Procedure, which bars an action upon a contract, obligation or liability not founded upon a written instrument, within two years.

It seems to be conceded by appellant that the limitation statutes of the state in which action is brought control the time for the commencement of the suit, and this likewise is settled by the decisions of the federal courts.

Chicago Etc. Co. v. Ziebarth (C. C. A. 8th Cir),
245 Fed. 334, and cases therein cited.

The above case is also authority for the proposition that the liability for freight is one created by statute and barred by the three years' statute, but for the purposes of this case it makes no difference whether one or the other applies, for more than three years lapsed before the suit was commenced.

If, therefore, counsel's contention that the matter of freight charges is no longer the subject of the right of contract of the parties, but is governed and controlled exclusively by the act of Congress, it would seem that the liability must be treated as one created by statute, and therefore barred within three years. (See brief p. 16.)

But whether that be true or not, it is certain that the liability sought to be enforced in this case is not founded upon a written instrument. The only provision in the bill of lading on the subject of respon-

sibility for freight charges is section 8, which reads as follows:

“The owner or consignee shall pay the freight and other lawful charges accruing on said property, and, if required, shall pay the same before delivery.”

It is not alleged that defendant was the owner of the goods, and it appears on the face of the pleadings that defendant was not the consignee. It is not possible, therefore, we submit, to claim that there is any express written promise by defendant to pay the freight.

Moreover, it will be noted that the bill of lading is a contract between the Santa Fe and the shipper, and nowhere is there any promise to pay the New York Central Railroad Company anything. That obligation does not arise out of the bill of lading, but arises by implication of law, if at all.

Still further, it will be noticed that the written contract covers only the shipment of the goods from Cucamonga to Kansas City, and the obligation as to the freight from that point on to its ultimate destination grows out of the reconsignment or diversion orders alleged in the complaint, which gave rise to an obligation to pay the freight for that service through operation and implication of law, and not by virtue of any written contract.

From any conceivable standpoint, therefore, the obligation is not founded upon a written instrument, and therefore, if it is dependent upon the obligation implied by law, is barred within two years, and if dependent

upon the statute, is barred within three years, both of which limitations are pleaded.

The Yazoo Etc. R. Co. v. Zemurray case (238 Fed. 789), above cited, is likewise authority for this proposition. There the bill of lading also provided that the consignee should pay the freight, and the only obligation of the consignor was one implied by law. The court said:

“Since the shipment was regular in all respects, and the only thing complained of is the failure of parties responsible to pay the freight, we are also of the opinion that even on the case made the plaintiff in error delayed too long to bring suit, and his claim is prescribed under the Louisiana law by three years as pleaded in the case.”

238 Fed. 791.

It is well settled that even though this freight bill be construed as a contract made for the benefit of connecting carriers as well as the initial carrier, and even if the obligation to pay freight grew out of the contract in the sense that the bill of lading constitutes a link in the chain which gives rise to the obligation, nevertheless the obligation cannot be said to be founded upon a written instrument in the absence of an express promise by the defendant to pay the freight to the New York Central Railroad Company. Thus, in the case of

Washer v. Independent Etc. Co., 142 Cal. 703, it is said:

"Upon the principle of law long recognized and clearly established, that where one person for a valuable consideration, engages with another to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, could maintain an action for the breach of such engagement; * * * that it does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon the broad and more satisfactory basis that the *law, operating upon the acts of the parties, creates a debt, establishes a privity and implies the promises and obligations on which the action is founded.*"

Again:

"But a cause of action is not upon a contract founded upon an instrument in writing, within the meaning of the code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instrument would be a link in the chain of evidence establishing the cause of action. *In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing, for the non-performance of which the action is brought.*"

McCarthy v. Mt. Tecate L. & W. Co. 111 Cal.
328.

See also:

Scrivner v. Woodward, 139 Cal. 314;
Chipman v. Morrill, 20 Cal. 134;
Thomas v. Pacific Beach Co., 115 Cal. 136;
Patterson v. Doe, 130 Cal. 333;
Whalen v. Gordon (C. C. A. 8th Cir.), 95 Fed.
305, especially 313.

It is respectfully submitted that this court has no jurisdiction, and in any event, the case is barred by the statute of limitations, and the demurrer therefore was properly sustained and the action dismissed.

Respectfully submitted,

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